2000

Blake William Waddoups, James Edward Sparrow, Jr. v. The Amalgamated Sugar Company : Brief of Appellee

Utah Supreme Court

Trent J. Waddoups; Carr & Waddoups; Attorneys for Appellants.
W. Mark Gavre; Parsons, Behle & Latimer; Attorneys for Appellee.

IN THE SUPREME COURT OF THE STATE OF UTAH

BLAKE WILLIAM WADDOUPS and JAMES EDWARD SPARROW, JR., Plaintiffs and Appellants, vs. THE AMALGAMATED SUGAR COMPANY, a Utah corporation, et al., Defendant and Appellee	20000776-SC Case No. 990059-SC Priority No. 15

ADDENDUM
to Brief of The Appellee

Appeal From The Second Judicial District Court,
Weber County, Judge Stanton M. Taylor

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ORAL ARGUMENT REQUESTED

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CERTIFIED COPY

IN THE SECOND JUDICIAL DISTRICT COURT OF

WEBER COUNTY, STATE OF UTAH

BLAKE WILLIAM WADDOUPS JAMES EDWARD SPARROW, JR., Plaintiffs, vs. THE AMALGAMATED SUGAR COMPANY, a Utah corporation, et al., Defendants.	Case No. 950900441 and Judge Stanton Taylor DEPOSITION OF: **JAMES E. SPARROW, JR.**

The deposition of **JAMES EDWARD SPARROW, JR.,** a witness in the above-entitled cause, taken before LANETTE SHINDURLING, Registered Professional Reporter and Notary Public in and for the State of Utah, at the law offices of PARSONS, BEHLE & LATIMER, 201 South Main Street, Suite 1800, Salt Lake City, Utah, on the 19th day of August, 1996, commencing at 9:00 a.m.

Q What was your address in Twin Falls?
A 182 F Street North.
Q And how long did you live at that address in Twin Falls?
A Two years.
Q And where did you live before that?
A Before that, 196 Van Buren.
Q Is that in Twin Falls as well?
A In Twin Falls.
Q And how long did you live at that address?
A Ten years.
Q Okay. Are you currently employed, Mr. Sparrow?
A Yes.
Q And where are you employed?
A Barclay-- actually, it's Express Personnel, temporary service.
Q So you're working for a temporary service?
A Uh-huh (affirmative).
Q And it's called Express Personnel?
A Uh-huh (affirmative).
Q And where is it located?
A In Burley, Idaho.
Q And how long have you worked for Express Personnel?

A For one year.
Q And where are you currently performing your work?
A I am contracted out to Barclay Mechanical Services.
Q And where is that?
A It's in Paul, Idaho.
Q I'm sorry?
A Paul, Idaho.
Q And how long have you been working at Barclay Mechanical Services?
A One month.
Q And where did you work before that?
A At Rain for Rent.
Q I'm sorry?
A Rain for Rent.
Q Where is that?
A Paul, Idaho.
Q What kind of company is that?
A Irrigation pipe.
Q And how long did you work there?
A Five months.
Q And what did you do there?
A We would make pipe, then load it on trucks and deliver it to farmers.

Q Okay. And while you were working there you were still working at Express Personnel?
A It's all through Express.
Q Okay. And prior to that job where were you working?
A Koch Agri Services.
Q Coke?
A Yeah, it's in Rupert, Idaho.
Q C-O-K-E?
A It's K-O-C-H.
Q And where is it again?
A Rupert.
Q What did you do there?
A I loaded rail cars up with grain.
Q And this, again, was while you were at Express Personnel?
A Uh-huh (affirmative).
Q And how long did you work at Koch?
A Three months.
Q Okay. And where did you work before that?
A I didn't. Oh, no, through Express I worked at Oreida in a potato cellar.
Q So your job before Koch was--
A At Oreida.
Q And were you working at Express Personnel

at this time?

A Yes.

Q And what were you doing at Oreida?

A Running a-- what do they call them, a piler.

Q And how long did you work there?

A One month.

Q And did you have any work before Oreida?

A No.

Q So was Oreida the first job you had through Express Personnel?

A Yes.

Q And you said that you had been at Express Personnel for about a year?

A Uh-huh (affirmative).

Q Okay. And before you went to Express Personnel, did you have another job?

A No.

Q So were you unemployed prior to going to Express Personnel?

A Yes.

Q Okay. Were you unemployed from the time you were terminated by Amalgamated Sugar until you went to Express Personnel?

A No. I worked two weeks at a Jerome Cheese

Factory.

Q What was the name of that company?

A I believe it's Jerome Cheese.

Q Okay. And this is a job you had directly with that company as opposed to going through Express Personnel?

A Yes.

Q Did you have any other job since you left Amalgamated Sugar?

A No.

Q So did you go through a period of unemployment before you went to Jerome Cheese?

A Yes.

Q And how much time was there between when you left Amalgamated Sugar and when you started at Jerome Cheese?

A One month.

Q And then how long did you work at Jerome Cheese?

A Two weeks.

Q And why did you leave Jerome Cheese?

A I quit.

Q Why did you quit Jerome Cheese?

A Because of their unsafe practices.

Q What were the unsafe practices at Jerome

call it?

A Rain for Rent?

Q Yes.

A I went there, it was their busy season and it was a seasonal job and when we got laid off there I went to Barclays.

Q With your current job at Barclay, do you know how long that will last?

A It's just a temporary job. They're saying two to four weeks, but they're trying to get me on full-time as a bulk loader out there to fill green cars up with sugar because Barclays is a grain storage facility and that's what they'll be doing out there. They're trying to see if they-- some of the bosses are trying to see if they can get me on full-time out there.

Q So it may happen that you'll become a full-time employee at Barclay as a bulk loader?

A Yes.

Q When do you think that will happen, if it does happen?

A I would say two to four weeks.

Q Does that mean you would become a regular employee of Barclay as opposed to working through Express Personnel?

A Yes.
Q Do you think that your pay would change if you got that regular job?
A Yes.
Q Do you know what you would get paid if you got that regular job?
A I would say $8.50.
Q Is that what someone has told you?
A Yes.
Q Have you applied to work at any plant of Amalgamated Sugar since you were fired?
A Yes.
Q Where did you apply?
A It was for a beet dump.
Q I'm sorry?
A It was at a beet dump in Paul, Idaho.
Q What is a beet dump?
A Where they store their beets for their plants.
Q Okay. And when did you apply for work at this beet dump?
A The day after I got laid off at Oreida.
Q Okay. And what response did you get when you applied for a job at this beet dump?
A The response was, the lady I talked to

No. 3 and you just don't recall it now?

A I just don't recall it, but it--

Q Is it possible that you received Exhibit No. 3?

A Yes.

Q Does the contents of Exhibit No. 3 seem familiar to you?

A Yes. It sounds like something they would say.

Q Looking at the second section of Exhibit No. 3 which is labeled Attendance and then looking at the last sentence of that paragraph, you see that it says, "The maximum number of unexcused absences you can receive before being terminated is three." Do you see that?

A Uh-huh (affirmative). Yes.

Q Do you recall being informed of the rule that you could have no more than three unexcused absences?

A Yes.

Q When do you recall being informed of that rule?

A All the time.

Q All the time?

A Uh-huh (affirmative).

Q You mean it was said to you--
A Well, people were always talking about it, you know, foremen, supervisors.
Q Could you elaborate on that?
A Uh-huh (affirmative).
Q When did people talk about it?
A At work.
Q So you're saying your co-workers and supervisors regularly talked about this rule that you could have no more than three unexcused absences?
A Yes.
Q So you knew or you were familiar with this rule?
A Yes.
Q After you began working at Amalgamated Sugar did you join a union at some time?
A Right away.
Q Was that in 1989 when you were part-time?
A Yes.
Q Or 1993 when you were full-time?
A Part-time back in '89.
Q And so you were a member of this union during the entire time you worked at Amalgamated?
A Yes.

Q Are you still a member of this union?
A No.
Q What is the name of the union?
A Grain Millers.
Q Was there a contract or a laborer agreement between this union and Amalgamated Sugar?
A Yes.
Q And did this labor agreement cover you?
A Yes.
Q Okay. Did you have a copy of the labor agreement?
A Yes.
Q Is this something that was published in a little booklet?
A Yes.
Q And did every union employee get a copy of this contract?
A Yes.
Q So you were familiar with the contract?
A Uh-huh (affirmative). Yes.
Q Did you read the contract?
A Yes.
Q Was there a representative of the union at Amalgamated Sugar?
A Yes.

A No.

Q Why was it that you never spoke to the union president?

A About what?

Q Well, about anything.

A I never had to.

Q Okay. Were you enemies?

A No.

Q You're saying you just never had any reason to talk with him?

A No, no reason.

Q I take it you didn't have any bad experience with him?

A With him?

Q Yes.

A No. He was a coward. I thought he was a coward and he wouldn't do anything anyway. That's why I wouldn't go to him anyway.

Q What is it that makes you think that the union president was a coward?

A All the other talk from the other employees.

Q And what was the talk from the other employees?

A Not good.

Q But you just don't recall--

A I just don't--

Q You don't recall reading that portion of the contract?

A I did. I remember reading it, but I don't think I understood it at the time. I understand it a little bit now because of the way you're bringing it out, but--

Q Okay. Going down to the last sentence of paragraph 14.1 it says, "An employee who believes his discipline or discharge is not justified shall have recourse to the grievance procedure under the agreement." Do you see that?

A Yes.

Q Did you know that an employee who is discharged who does not think it's fair or justified can have a grievance filed?

A Yes.

Q You knew you could file a grievance upon being discharged?

A Yes.

Q And did you know that there was a grievance procedure?

A Yes.

Q And, in fact, it's a three-step grievance

and arbitration procedure?

A I'm not quite sure what the steps are, but I knew they were there.

Q You knew there were some steps?

A Uh-huh (affirmative).

Q And did you know that it not only was steps for filing a grievance, but that there was at the end of the process an arbitration procedure?

A Yes.

Q And did you know these things in May 1995 when you were discharged?

A Yes.

Q Now, this union agreement, labor agreement says that the company has the right to fire people for just cause, to discipline or discharge employees for just cause. Do you think you were discharged for just cause?

A Yeah, could you explain that for just cause?

Q Well, I'm just like you reading the contract. I don't have any secret meaning in mind. I'm just reading.

A I know what they've told me and just cause, it's two different things.

Q So what I'm asking for is what you

Q (BY MR. GAVRE) I don't care whose definition.

A Just cause, I'm trying to think. I would say no.

Q That's what I'm asking.

MR. CARR: That's his answer.

MR. GAVRE: Mr. Carr, I'll ask the questions, he'll answer. You don't have to comment that that was his answer.

MR. CARR: It's on the record.

Q (BY MR. GAVRE) Now, when you say that you believe there was not just cause for your discharge, why do you say that?

A Can you repeat that?

Q Well, I'm not trying to put words in your mouth, but I believe you testified that in your opinion there was not just cause for your discharge. Is that correct?

A Correct.

Q Okay. Why do you believe that?

A Because there were things going on at the factory.

Q Can you elaborate on what you mean by there were things going on at the factory?

A Illegal shipping of sugar.

Q Okay. What do you mean by "illegal shipping of sugar"?

A Contaminated.

Q Okay. So you believe there was contaminated sugar being shipped by the company?

A Yes.

Q And how was the idea that there was contaminated sugar being shipped by the company connected to your discharge?

A Because they knew I was there when the comment was brought up to them and I was just in the room at the time so they knew I knew or thought I knew.

Q Okay. You're referring to something very cryptically. Could you explain what you mean by the comment was brought up to the company and you were in the room?

A We asked them if they sent some contaminated cars, if it was destroyed or actually shipped to customers and they didn't give us an answer.

Q Okay. When you say "we," who are you referring to?

A Blake Waddoups and me, and I.

Q And you're referring to some particular

the bagging area. I told Darwayne, That's not right. We were loading cars at the time, you know. That's about the only thing I said. He's not doing a thorough check. That's what he told him.

Q Okay. Can you pin down when in particular this occurred?

A It would have been like February 20th. It was like four days after his death.

Q Are you sure about the exact date or is that just kind of an approximate time?

A It's real approximate, but I can't say for sure because it took us three days to clean it up. We waited more or less a day after the accident to clean it up and we waited three days after the accident and then started right back up.

Q So you're talking about a time when sugar was being pushed through the system?

A Yes.

Q And some of the sugar that was being pushed through the system was bagged?

A Yes.

Q And you're saying the microbiologist was checking some of that bagged sugar?

A Uh-huh, because I was the one who went and got the bags to him and took it to where he was at.

head down and close my eyes for a while there, especially on the graveyard shifts.

Q When you say Otto threatened you, can you take me through that.

A I can remember about two weeks before I was terminated, Otto wouldn't show up to work until around eight o'clock, we had to be there at six. I was sitting at my desk filling out some paperwork. He walked in and slapped me up to the side of the head with that yellow notebook and he said, Well, is today the day I get to fire you? I said, What for? He said, For messing up.

Q And that's what he said?

A Uh-huh (affirmative).

Q Did he say any more than that?

A No.

Q Did you say anything in response?

A I just-- What for?

Q And he said, For messing up?

A Something like that.

Q Do you recall exactly what he said?

A No. I don't recall, just something similar to that.

Q So he came into the office and asked, Is today the day I get to fire you?

A Uh-huh (affirmative).
Q And you said, What for?
A Uh-huh (affirmative).
Q And he said, For messing up?
A Or something similar to that.
Q Did you say anything further?
A No.
Q Did he say anything further?
A No.
Q Did he stay in the office or leave, or what happened after that?
A He probably stayed in the office.
Q And then what did you do?
A I think I got up to go check my rail cars.
Q Do you remember when that happened?
A About two weeks, if that long, right before I got fired.
Q Okay. Was that the only time Otto said something like that to you?
A There was one other time, but it was the death and it has nothing to do with this. It had something to do with where they thought I had flunked a car.
Q Tell me what you mean by flunked a car.
A I loaded up a rail car, I think it went to

day we went there to turn in our stuff.

Q What day are you talking about?

A It would have been May 31st, I believe. It was after we were fired.

Q This is after you were fired?

A Uh-huh. Because we said, We'll just tell the customers what you did. He said, Well, you're fired and we'll just say you're a disgruntled employee.

Q After you were fired you saw Vic Jaro?

A Uh-huh (affirmative).

Q What did you say to Vic Jaro?

A I didn't say nothing.

Q Okay. And you were with Blake Waddoups?

A Blake Waddoups.

Q And what did Blake Waddoups say?

A He demanded to see the shipping reports of where those cars went.

Q By "those cars" you mean the two rail cars?

A The two rail cars, yes.

Q That were being filled on the day of Mike Davis's death?

A Uh-huh (affirmative).

Q And did he, in fact, get to see what he

wanted to see?

A Yes.

Q And what did those records show?

A They show that it was shipped to a customer instead of being destroyed.

Q Did it show what customer it was shipped to?

A Yes.

Q What customer was that?

A Some pet place. I can't remember. He just-- we just got to glance at them, he just showed them.

Q And it showed that it was shipped to a pet food manufacturer or animal feed manufacturer?

A Something. I just looked up there. I was standing next to him, I just glanced at it. He just showed it real quick and closed it.

Q Okay. And after the two of you got to see this shipping record, then what happened?

A Nothing. He told us to get off the premises.

Q You said that--

A Blake said, We'll just tell the customers what you've been doing.

Q Is that all that Blake said, We'll tell

Vic Jaro?

A Blake demanded to. I was just with him.

Q So where did you meet with Vic Jaro?

A It started inside the lunchroom and ended out by the-- on the outside of the office there, all the way out to the front gate.

Q So was this a conversation as people were walking or what?

A Blake was kind of hollering, demanding to see certain paperworks, you know, wanting this and wanting to see that and things like that.

Q So it started in the lunchroom?

A Uh-huh (affirmative).

Q And who was there?

A I know Bill Stewart was because he was trying to calm Blake down. I believe Dan Taylor was and just Blake and Otto-- I mean Vic.

Q And you said that Blake was hollering?

A Uh-huh (affirmative).

Q What was he hollering about?

A Demanding to see paperwork, the shipping reports.

Q Did he say why?

A Because he knows the sugar-- he already knew by then for sure the sugar had been sold to

somebody else besides being destroyed.

Q How is it that Blake already knew this?

A Because a week before that he was suspended and I guess when he was being suspended Otto brought up the fact-- Otto said something about the sugar was shipped to a pet supply.

Q Okay.

A Something to that effect. You'll have to ask him for sure, but that's what it was.

Q How did you learn this?

A He told me.

Q Who is "he"?

A Blake.

Q When?

A After he got suspended.

Q Okay. So at this meeting when the two of you went back--

A And it was what we speculated before just came out the truth when Otto mentioned that to Blake when he got suspended. It was just something that we always thought and felt. And I don't know, if I had any questions I would ask Blake or if I wanted something fixed up there, I was always the quiet one, Blake, get this fixed, and Blake would get it fixed because he wouldn't stop until it was done one

way or another. So it was Blake, ask them this, ask them that, and he would.

Q Okay. But going back to this meeting that you had when you and Blake Waddoups went back to the plant, I think you said it was on the 31st of May?

A I believe it was.

Q Okay. You said Blake was hollering to see some kind of shipping records?

A Uh-huh (affirmative).

Q And this started out in the lunchroom?

A Uh-huh (affirmative).

Q Then someone showed him the shipping records?

A Vic did.

Q And where did this take place?

A That took place out by the front gate.

Q So how did you move from the lunchroom to the front gate?

A Well, at one time they were telling us to get off the premises because it was private property so we were moving out. Blake is hollering as we go, and Vic finally must have give in and said okay and went and got them and showed them to us. I just had a quick glance at them.

Q Okay. And after Blake was showing you

Q Just focusing on yourself, at any time after the Mike Davis accident did you bring up any concern you had about possible contaminated sugar?

A No.

Q You never brought it up to anyone?

A No.

Q You didn't mention it to Darwayne?

A No, because he said it was going to be destroyed so I figured they would destroy it.

Q Okay. But whether it's about those rail cars or those two rail cars or any other area, did you at any time bring up any concern about contaminated sugar at any time after Mike Davis's death?

A Once about the humidifier.

Q Explain that to me.

A The humidifier is a hose we hook up into the bottom of the cars that blows warm air into the cars. You can stand there and turn it on and put your hand in front of it and it's shooting particles. It's taking particles from where it sits at and it's blowing them into the cars.

Q So some kind of dust particles could be getting into those cars through the humidifier?

A Uh-huh (affirmative).

Q And did you raise that concern with anyone?

A I just told Darwayne about that, you know, What good does that do? You know, Why do we have to do this?

Q But did you tell Darwayne about dust particles getting into the car?

A Uh-huh (affirmative). He went out and stuck his hand in front of it and he could feel it.

Q What did he say?

A Yeah, but there was nothing he could do about it.

Q Did you tell anyone besides Darwayne about this?

A No.

Q Are you saying that there's some connection between your telling Darwayne about the dust particles and the humidifier and your getting fired?

A Did I say that?

Q Are you saying that?

A No. That had nothing to do with the death so I didn't.

Q So with respect to Mike Davis's death, did you raise any issue of contamination with anyone?

A No.

MR. CARR: Just a point of clarification, I apologize because I did miss some here. It's my understanding from his previous testimony that he was in the presence of Mr. Waddoups when Mr. Waddoups brought these things up about the contamination from the accident.

MR. GAVRE: I was only asking about what Mr. Sparrow himself did.

MR. CARR: I understand, but they were together when this happened.

MR. GAVRE: I haven't disputed that. I'm just trying to get information down.

Q (BY MR. GAVRE) Mr. Sparrow, I'm not trying to argue with you about anything. I'm trying to learn what you know and what you think happened. So I'm asking a lot of questions just so I can get the story down in the level of detail I need, that's all.

When you had that final meeting out at the plant after you and Blake had been fired and the two of you came back and you've described that Blake was hollering and asking about the shipping records and about those two rail cars and that eventually Vic or someone showed him the shipping records--

A It was Vic.

Q Vic, okay. Did Vic say anything?

A Not that I can recall.

Q Did Vic point out what the shipping records showed?

A No. Because he just opened it and I can remember-- I just had a chance to glance at it, he didn't have it open very long, and just kind of asked us to leave.

Q Okay. Did Vic show any reluctance to show either you or Blake those shipping records?

A Uh-huh, yes.

Q Did he say why?

A No. Just something like it was company property and, you know, we were no longer an employee-- you know, employed there, you know, something like that.

Q When you got fired did you file a grievance with the union?

A No.

Q Did you think about filing a grievance?

A Yes.

Q Why did you not file a grievance?

A Because it would have been, I believe, May 26th when I talked to Bill Stewart on the phone, I

there's no mystery there.

A Yes.

Q So you knew that. So why didn't you file a grievance to see whether you would get some success through the grievance process?

MR. CARR: For the record, I want to voice an objection as asked and answered. He's already told you he talked to his supervisor who told him it wouldn't do any good. Can you answer?

Q (BY MR. GAVRE) Aside from the fact that Bill Stewart told you whatever he told you, why didn't you file a grievance?

A Because we feel like it wouldn't do any good.

Q When you say "we"?

A Blake and I.

Q I'm really asking about you.

A I didn't feel like it would either.

Q Why is that?

A Because I felt they wanted us gone. We were looking for any little excuse, they got one and they're got going to let go of it.

Q Any other reason?

A No.

Q Can you briefly describe to me your duties

as a bulk loader?

A Briefly describe. Just be a bulk loader, to put sugar in the rail cars and make sure they're in grade, proper sealed, paperwork, and take your samples like you're supposed to.

Q What samples are you supposed to take?

A You're supposed to take one at the beginning, the start, depending on the customer, you take one every 500 or even every 200, every 200 bags, I mean, and you take them to the lab and be sure they're in grade, your sugar is in grade, it has to be between certain specifications. And I don't know, proper placement of the seals and the sanitation of the sugar.

Q Okay. Did you do any sampling, take any other samples than the one you just described every 200 or 500 bags?

A No.

Q Is there another sample that's taken to be tested for purity or anything like that?

A Yes. It's called a composite.

Q Okay. The composite sample?

A Everytime I take a sample I take a little bit of that and put it into your composite bottle. When you're done you have a little bit of sugar from

the beginning, the middle and the end and you take it to the lab and they run the pads over it and check for ash or whatever.

Q So the second sample, what you called the composite sample, is that test for purity of the sugar?

A Sure, yeah.

Q And any contaminants and that kind of thing?

A Sure.

Q How is that composite sample taken?

A A little wand that you hold under the spout where the sugar is coming out.

Q The wand is something that collects it?

A Yeah, it has a little bucket on it and you fill it up and pour it into these little plastic bottles.

Q If you're filling a rail car, how long do you take a sample with this wand?

A To start, every 500. Okay. When you get to going, you take one at the start, then every 500 or 150, or it could be at the start or every 200, depending on the customer, depending on what they want.

Q Are there two different sampling

some lab people to do the testing of the sugar?

A Yes.

Q And for the composite test, you don't do any of that testing?

A No. Well, some of them will sit there all weekend long before somebody comes in Monday and does it.

Q So I take it that you're not in the position yourself to judge the quality or the purity of the sugar of any one shipment?

A No.

Q And as a bulk loader, do you fill out any forms?

A Yes.

Q You fill out just one form or multiple forms, or how do you do that?

A We fill out three.

Q Okay. Can you describe the three forms you fill out?

A One of them is your shipping report.

Q What do you fill out on a shipping report?

A The seal numbers, what cell are you coming out of, the car number, the seals, the numbers you put on the car, what time you started, finished.

Q And this is on the shipping report?

A Yes.

Q Okay. What's the other form you fill out or second form you fill out?

A Inspection report.

Q Okay. What is that?

A That's when you write down each number of the seals you put on the car, then you check, and on the bottom-- the top portion is supposed to be filled out by somebody else. It's supposed to be filled out by the foreman. I used to do it at one time and I was told not to do it no more. The bottom part that you fill out, was your car ready, cleaned, ready for loading, you write down yes.

Q So do you check out the car and then you--

A Some cars you check more closely than others, but yes.

Q Okay. And what's the third form you fill out?

A Well, I used to fill it out but I wouldn't sign it, I would get it ready for my foreman, and it would be the seal report.

Q This is another report?

A Uh-huh (affirmative).

Q Another piece of paper?

A Uh-huh (affirmative).

A Yes.

Q And on the seal report do you put down each seal number?

A Yes.

Q Is there anything else that goes on this seal report?

A No.

Q Is there a place for you to sign it?

A Not for me.

Q And the bulk loader doesn't sign the seal report?

A No.

Q And what do you do with this document, the seal report document, when you're finished?

A I just set it out for my foreman.

(Exhibit 5 marked for identification.)

Q (BY MR. GAVRE) Mr. Sparrow, let me show you what's been marked as Exhibit No. 5. Will you take a minute to look at it? I'm not going to ask you anything about this particular document, but I was hoping you could identify for me the kind of document it is.

A It's the inspection report.

Q Okay. So is this one of the three documents that you, as a bulk loader, fill out?

A Uh-huh, yes.

Q And I notice at the top it's labeled Initial and Final Inspection, Bulk Shipments. And then it's got several categories, the first one being Initial Inspection, the second one being Car Cleaning Report and the third being Car Loading Report. And does a bulk loader like yourself or Mr. Waddoups fill out just the Car Loading Report section of this?

A Yes.

Q So this is one of the three reports you regularly fill out?

A Yes, down here.

Q Is that correct?

A Yes.

Q And you only fill out the section of the page that comes under the title Car Loading Report; is that correct?

A Yes.

Q And then after you check the boxes yes or no you put the date and time, and do you put-- excuse me. You don't put the date and time, that's under the next section, but would you normally put your signature where it says Signature - Bulk Loader?

A Yes.

MR. CARR: Just so I'm clear, we're talking only about the 15 lines between Car Loading Report and Final Inspection and Approval for Shipment; is that correct?

THE WITNESS: Yes.

MR. GAVRE: Well, I don't know if it's 15. I do see the numbering, although it looks like at least numbers 1 and 2 appear to be--

MR. CARR: You're right.

MR. GAVRE: -- above the heading.

Q (BY MR. GAVRE) But let me ask Mr. Sparrow, just looking at this document, No. 5, you see along the sides there is a place for seal numbers and I see on the left-hand side it's numbered 1 through 15 for top of car and then it's numbered 1 through 15 for bottom of car, and I see that some seal numbers on this particular one are filled in?

A Yes.

Q Do you, as the bulk loader, have any role in putting in these seal numbers on this page?

A On this side, no.

Q You're talking about, just so the record indicates--

A On the left-hand side, no. On this side, on the right-hand side, yes. These are the seals that we'll be putting on the car. These are inbound seals. When the car comes in they should be sealed.

Q Okay. So in filling out this report, which is Exhibit 5, you fill in the seal numbers of the seals you put on--

A Yes.

Q -- is that correct? Both on the top of the car and the bottom of the car?

A Yes.

Q So there's more openings to be sealed on the top of the car than there are on the bottom of the car?

A Yes.

Q So you put these numbers in on the right-hand column, but on the left-hand column over here, you don't do any of that?

A No.

Q Is that correct?

A No.

Q And then when you're through you would sign your name as bulk loader; is that correct?

A Yes.

(Exhibit 6 marked for identification.)

Q (BY MR. GAVRE) Mr. Sparrow, let me show you what's been marked as Exhibit 6. Again, I'm just using this as an example of perhaps the kind of form you were testifying about. I'm not going to ask you any questions about this particular one. But this looks to me like a shipping report or perhaps part of a shipping report. Does it look familiar to you?

A Yes. It's a customer order.

Q Okay. Is this one of the three documents you were describing before that you filled out?

A Yes.

Q And is this what's called an SR or Shipping Report?

A Yes.

Q And I notice on this form or on Exhibit 6, on the bottom third of the page there's something that's labeled Bulk Car Loading Chart. Do you see that?

A Yes.

Q And as a bulk loader do you fill out part of this chart?

A Yes.

Q And what part do you fill out?

A All of it.

Q Okay. And you put your name down as the bulk loader?

A Yes.

Q And do you just put your name down or do you go ahead and sign it the way you sign the other form?

A You just write down Sparrow.

Q So you don't actually sign it, you just indicate that you were, in fact, the bulk loader?

A Uh-huh (affirmative).

Q Okay. Now, in addition to these two documents, Exhibit 5 and Exhibit 6, there's a third document that you fill out; is that right?

A You don't have to. I used to just do it to help my foreman.

Q And that's a form--

A The seal numbers, and you just write down the seal numbers.

Q But that's not a form as bulk loader you're asked to fill out?

A No.

Q But you used to do it for a while?

A Yeah.

Q As a favor to your foreman?

A Yes.

MR. CARR: Don't argue with me.

MR. GAVRE: Just make your objection. That's all have you to do. I can go on.

MR. CARR: Let me finish it before you keep talking, okay?

MR. GAVRE: Go ahead.

MR. CARR: The objection is you're asking him to interpret a legal document and he's not qualified, it would be pure speculation on his part.

MR. GAVRE: I didn't ask him to interpret any document.

Q (BY MR. GAVRE) Mr. Sparrow, you testified earlier about an occasion in which you called in and spoke with Bill Stewart and said that you would be in at a certain time and it turned out you fell asleep and you didn't get in until later. Do you remember that?

A Yes.

Q And you were testifying about that in connection with your working for the Target store. I believe you said that in fact you told Bill Stewart that you were tired and that's why you had fallen asleep?

A Yeah.

Q Is it your understanding that that was an unexcused absence?

MR. CARR: Same objection. You can answer.

THE WITNESS: That it was an unexcused absence?

Q (BY MR. GAVRE) Yes.

A And that should have been my first one. The one dating back to September 10th, I have no recollection at all on that.

(Exhibit 8 marked for identification.)

Q (BY MR. GAVRE) Mr. Sparrow, let me show you a document that's been labeled as Exhibit 8. Again, I assume you have not seen this before. Let me just state for the record that this is a handwritten note that Bill Stewart made about the incident, I believe, Mr. Sparrow that you were talking about. If you want to--

A "I talked to James Sparrow about not being"--

MR. CARR: Wait a minute. I interpose an objection, again, he has not seen this document.

MR. GAVRE: I didn't say he had.

MR. CARR: It's hearsay. Listen, you don't need to argue with me. This is just a

deposition, I can put my objections on the record.

MR. GAVRE: I know, you're just slowing this down. No one is asking him to authenticate or corroborate this. This may be--

MR. CARR: He can read it silently, he doesn't need to read it into the record.

MR. GAVRE: That's true, but I asked him too and he did.

MR. CARR: Make it an Exhibit.

Q (BY MR. GAVRE) It is an Exhibit.

A "I talked to James Sparrow about not being to work on time. He called at 7:15 a.m., said he would be here at 8:00 a.m. He fell back to sleep and did not show up until 10:00 a.m. He was given four hours unexcused and explained what would happen if he had any more unexcused absences."

Q Does that refresh your recollection of this incident?

A Not the September 10th. I know that's what it's dated. As far as that's what more or less was said between Bill Stewart and I when we talked, but I thought it was at a later date.

Q That's fine. But there's no question that this event happened?

A Yes.

A I didn't drive. I rode.
Q But your sickness, whatever it was, didn't prevent you from going to Nevada?
A No, it didn't.
Q So you could have gone to work that day?
A No, I couldn't have.
Q You were well enough to go in a car to Nevada--
A That's also almost ten hours later.
Q Okay. So are you saying you felt better by the time you went to Nevada?
A Some better, but I was still in bed, though.
Q Tell me again, how did you feel, what kind of illness did you have that led you to call in sick.
A I just-- it was just nerves in my stomach. I just felt really queasy and I just didn't feel like going to work mostly. It was just the place had gotten to me and I just didn't feel like being there.
Q So you called in sick?
A Yes.
Q And then you got on the road with your ex-wife; is that what you said?

A Yes.
Q And the two of you drove to Nevada?
A Yes.
Q And then at some point you were stopped by the police; is that correct?
A Yes.
Q And were you driving at that time?
A The first time, no, the second time yes.
Q So the car was stopped twice?
A Yes.
Q And the first time it was stopped it was your ex-wife driving?
A Yes.
Q And why was the car stopped?
A Speeding.
Q And then did your ex-wife get a speeding ticket?
A Yes.
Q And then did you take over driving after that?
A No.
Q Okay. At some point later you took over the driving?
A I took over, yes.
Q And then you were stopped by the police

A Yes.

Q And they saw that there was a bench warrant out for you and so you were taken to the Ely jail; is that right?

A Yes.

Q And that was because there was a bench warrant out from a prior incident and you hadn't paid the fine?

A Correct, yes.

Q So when you were in the Ely jail, did you ask someone to call in for you?

A My sister.

Q Did you tell her what you wanted her to say to the company?

A I told her to say I'm in jail.

Q And you spent four nights in jail?

A Three or four. I can't say for sure. I know I missed the last three days of work. I think it was only three, but by the time I got back to Twin-- three nights for sure, it might have been four.

(Exhibit 10 marked for identification.)

Q (BY MR. GAVRE) Okay. Mr. Sparrow, I've handed you what's been marked as Exhibit 10, which I assume you have not seen before, although you may

have. Have you seen this?

A No.

Q This is what we obtained from the County of Elko, the record of the court proceeding involving you that you've just been testifying about. If you would turn to the second page of the document--

MR. CARR: Again, same objections, this document is hearsay as to this witness.

MR. GAVRE: That's fine.

Q (BY MR. GAVRE) You see that there are dates running down the left-hand column and if we get to the last two dates on the page you'll see that one says 5-21-95 and then it says, "Defendant was arrested and booked on warrant in Ely, County of Elko State of Nevada." So the 21st is the day after you called in the first time so perhaps you were arrested around midnight?

A It was something like that. Probably by the time they booked me or whatever.

Q It was the next day?

A The time I come in from the police, yeah.

Q The next entry down, "Defendant released on cash bail in the amount of $675." So that indicates that you were released on the 25th of

May. Does that sound right to you?

A Yes.

Q What time of day were you released?

A Was I released? It's about a four or five-hour drive. About one or two o'clock in the morning because I got back to twin at six o'clock because I went straight to the sugar factory and my shift had just gotten over at 6:00.

Q So on the 25th of May you drove back to Twin Falls?

A Yes.

Q From were you in Elko or Ely?

A Ely.

Q And you said you went right back to the plant?

A Yes.

Q And your shift had just finished for the day?

A Yes. I got there like at 6:20 in the morning and I worked a night shift and they was, I guess if I remember right, I can't remember what day it was, they had had like that Friday and Saturday and Sunday off. I just went out there and nobody was there. The other shift just came on, nobody was out there so I waited a little bit, called my

foreman at home, he told me to call Bill Stewart.

Q I'm sorry, I couldn't hear you.

A Then he told me to call Bill Stewart.

Q Did you talk to anyone at the plant while you were there?

A No.

Q You phoned your foreman at home, and that's Wayne--

A Darwayne.

Q Excuse me, Darwayne. What did you tell him?

A I asked him if I was fired and he--

Q Why did you ask him if you were fired?

A Because I spent three days in jail and I should have worked. I worked Friday. I missed three days of work. That's unexcused. Plus I knew I had one before and that's four, and I knew I could be terminated for that.

Q You knew you could be terminated for unexcused absences and you had enough to be terminated?

A Yeah.

Q Did you say anything else to Darwayne besides asking whether you were fired?

A No, not that I can remember.

something and I talked to him the next day.

Q What did you tell Bill Stewart the next day?

A I asked him what was going on. He said, Well, I had to sign the paper saying you were fired, discharged the 22nd.

Q Okay. Did he say why?

A I can't remember. I'm sure he did.

Q Okay. What did you tell him?

A That's when I asked him if there was-- he asked me if I wanted to take it a step higher. I said, Well, like what, talk to Vic? He says, Well, I have already done that. I said, You have, Bill? And he said yes. I said, should I talk to Bill? Yes. Then I go, That won't make any difference, and he said, Yes, it does. Like I said before, I have respect for Bill Stewart and if he says, You're fired, then you're fired. So I just went along with him.

Q Okay. Was anything else said?

A No.

Q Did you tell him anything about why you had been arrested or why you were in jail?

A Not that I can remember. Oh, they came up. He asked me, he goes-- he asked me what time I

MR. CARR: Especially if he's reported it.

THE WITNESS: Can you repeat it now?

Q (BY MR. GAVRE) Was there any question in your mind that being absent from work because you're in jail is an unexcused absence?

A I have always believed before that it was.

Q It was always believed that it was an unexcused absence?

A Yes.

Q So by the time you got back to work on the 25th and your shift was finished you had four unexcused absences; is that correct?

A Correct.

Q What happened next after you had this telephone conversation with Bill Stewart on the 26th of May, 1995?

A What happened next? I went to Blake's house and--

Q What did you tell Blake?

A I didn't know he was fired at the time. Actually, I went next door to Blake's house because I was seeing a girl that lived next door to Blake. And then I see Blake's truck there and I go over there because he should have been at work. I said, What are you doing? And he goes, Like I'm fired.

Bulk Car Loading Chart, did you do anything else?

A No.

Q Regarding this car?

A No. Just the part I pointed about void and that, that's all.

Q You wrote in that part. We're looking at Exhibit 6. Is any other portion of the handwritten portion of Exhibit 6 in your handwriting?

A No.

Q Do you recognize the other handwriting on Exhibit 6?

A Blake Waddoups.

Q Okay. Did you ever tell anyone at Amalgamated that you did not want to sign off on shipments of adulterated sugar?

A Well, those two cars, I don't think it was that big of a deal if he would have or not. It was supposed to be destroyed.

Q But did you ever tell anyone at Amalgamated that you did not want to sign off on shipments of adulterated sugar?

A No.

Q On these cars or any other cars subsequently?

A Well, like that one car where I thought I

lost the plastic, or the cardboard in, but that was taken care of, so just that. And a couple of months before that I was taking a hygrometer, I was taking a reading towards the end of the car and I was pulling it back up and I hit it along the side of the hatch and two little small batteries came out of it and one of them I found and the other one I never did find so I suspected it landed in the car. And I didn't want my name to go to that if they were going to send it to a customer, but those were the only times, you know, I wouldn't want to sign my name to paperwork if it wasn't going to be taken care of and it was.

Q So you never told anyone at Amalgamated Sugar that you didn't want to sign off on shipments of sugar because it had sugar contaminated from the Mike Davis accident?

A No.

Q What is meant by the term "seal reports" or is that a term that means anything to you?

A It's just a like another precaution of being sure when the locomotives-- you know, when they take the cars to be shipped, that they are secure. They're supposed to look to be sure that the cars are sealed and then on another piece of

Q Now, did you sign any reports or sign your name to any documents under duress?

A Well, maybe you just haven't been there to feel the pressures and all this. Yes, it felt under duress.

Q Did you ever object to signing some form?

A No.

Q And have someone tell you--

A I didn't object, I just went and did it on my own, I went and took my name off of these.

Q You didn't care--

A I didn't care what anybody was going to say, I wanted my name off of it.

Q I just want to be sure with respect to what you're saying. With respect to the rail cars that were loaded on the day of the Mike Davis accident, you took your name off of the Bulk Car Loading Chart; is that correct?

A Yes. Well, yes. Order form, I still call that the order form.

Q That's fine with me. I'm not familiar with these forms the way you are. Now, at any later date did you refuse to sign some form?

A No.

Q Did you at any later date tell anyone at

Amalgamated that you didn't want to sign some form?

A No.

Q So as you continued to work as a bulk loader, for each rail car you would get a form like Exhibit 6; is that correct?

A Yes.

Q And you would fill it out as this one is filled out; is that correct?

A Yes.

Q And you would put your name down as the bulk loader?

A Yes.

Q And would you sign the form where it says Final Inspection and Sealed?

A If I did.

Q Yes, sir, of course.

A If I started the car and left like an hour later, my name would just be there on Preload. If I had just started loading it, Preload.

Q If you were the bulk loader?

A From start to finish, yes, I would sign it.

Q Then you would sign on the form that is Exhibit 6 on the line that says Final Inspection and Sealed; is that correct?

A Yes. I would sign it and the foreman would sign it.

Q Is there any occasion when you refused to sign it?

A Refused, no.

Q Was there any occasion in which you said to anyone that you didn't want to sign it?

A No.

Q Was there any occasion in which someone pressured you to sign it?

A No. If there was ever-- there was a couple of times, it seems like a Car Loaded By Blake Waddoups, sometimes it would have two people's names on it or three maybe, where it has happened in the past, but let's say head trims were not free of crusty sugar and I didn't want to load it. I would put my name there and I would go talk, because we've done it before, I would go, I don't like this. He would say, Load it and put my initials, and he would initial it to show it was like it was inspected by both of us. That's happened before.

Q But that doesn't have anything to do with the Mike Davis accident, does it?

A No. But I would have never stuck my name on it if he never would have initialed it, you know.

A No.

Q In 1995 did you have problems or difficulties with any employees, management employees or nonmanagement employees at the company?

A Management employees?

Q Or nonmanagement. I'm asking, you know, a big question.

A Just my co-worker.

Q Is that Sam Garcia?

A Uh-huh (affirmative).

Q And you've explained that he wasn't a very good worker, in your view, and you were having difficulty with him because he wasn't doing his job well enough?

A Correct.

Q Aside from those difficulties, did you have difficulty with anyone at Amalgamated?

A No.

Q Have you been in good health since you left Amalgamated?

A Yes. I just had a physical done two weeks ago.

Q And what was the result of the physical?

A She said I was very healthy.

Q And have you been in good health since May

'95 when you left Amalgamated?

A No.

Q Pardon?

A Not-- physically, yes, but emotionally, no.

Q Can you explain that?

A Well, just being fired it really bummed me out. It really made me feel like I was a nobody, a nothing, like I wasn't a worth a fight for, to stay on there at the sugar factory when I tried so hard to do them a good job. If they knew how many breaks I missed and how many times I missed lunch to make them look good, and then they didn't try once for me. It just made me feel like I wasn't worth it and it just kind of made you go, Wow, you know.

Q Okay.

A I couldn't believe it. I still don't.

Q Okay. But aside from being bummed out, or whatever term you want to use, from being fired, have you been otherwise in good health?

A Well, physically, yeah.

Q Have you seen a doctor since you left Amalgamated Sugar other than the doctor for the physical you just mentioned?

A Just when I have to go take drug testing

to go to these different jobs.

Q So different jobs require employee drug testing and you go and have that done?

A That's the only time I've had to see a doctor. I've never had to get counseling or nothing. I thought about it, but me and Blake would help ourselves. We would talk to each other. We helped ourselves through a lot more than any of those people will ever know.

Q So you haven't seen a psychologist or psychiatrist or therapist since you left Amalgamated; is that correct?

A Correct.

Q Have you been on any kind of medication since you left Amalgamated?

A No.

Q When you left Amalgamated in May of 1995, did you immediately begin looking for work?

A I would take a month.

Q So you didn't look for work for about a month?

A Correct.

Q Were you able to work at that time? Aside from not looking for a job, were you able to work if you had a job?

reference?

A Bill Stewart.

Q Okay. What did you ask Bill Stewart?

A Well, I went to Bill Stewart one day and I asked him, What the hell is this-- well, okay. I'm going to refer to when I applied at the beet dump and they said no. When that lady talked to Clara in personnel she just said, No, we don't even want him on the grounds. After that I went and talked to Bill and I said, Bill, what the hell are you guys doing saying this? He says, From now on just tell them to call me and I'll give you a good one, and I said thanks.

Q And do you know whether anyone ever called Bill Stewart?

A As far as I know, I think one person has.

Q Do you know who that would be?

A I believe it would be Oreida Foods.

Q And you worked at Oreida?

A Just through the temporary service out in their cellars, not in the factory itself. When I did in the factory then I applied.

Q You applied for a job at Oreida?

A Yes.

Q And you think that someone at Oreida may

have called Bill Stewart?

A Yes.

Q Why do you think that?

A Well, they were going to-- they were going to hire me. They put me through their physical, drug testing and everything and everything passed, and I don't know if they talked to Bill Stewart or if they talked to somebody else. Then all of a sudden they just said, We don't need you, and they just let me go. I didn't even have a chance to work or nothing. But first they set up extra appointments and I went through their physicals and everything. I had to take two physicals, one that they gave there at the factory and one at a doctor, and it included drug testing, and everything came back good and the next think I know, I can't say for sure, it's like they called the sugar factory and the sugar factory kind of told them what was going on and they said, No, we won't hire you then.

Q So you applied for a job at Oreida and you went through the physical exams, etc., and you did the drug test?

A Yes.

Q And then Oreida told you they weren't hiring; is that correct?

A Yes.
Q Did they say why they were not hiring you?
A They said they had everybody they needed.
Q Okay. Did they say anything else?
A No. She said I would be one of the first people they would call. They never did.
Q Do you remember the name of the person you spoke to at Oreida?
A Linda, the first name is Linda.
Q And she was the person who told you that--
A She was the personnel office who called Clara at the sugar factory.
Q This woman named Linda at Oreida said to you that they have everyone that they need right now?
A Yes.
Q And that you would be among the first called if they needed more people?
A Yes, which she never did. And I went there and applied again just a few weeks ago because they had it advertised in the paper and everything they needed people and I have done that kind of work before, and at least I've got experience, and why they won't hire me, I have no idea.
Q So you applied a second time at Oreida?

A Correct.

Q So you don't know what went on at the factory during the days of those four days; is that correct?

A Correct. It should have been cleanup, though.

Q Right. Before we took this last break you were talking about your application for employment at a company called Oreida.

A Yes.

Q Did anyone at Oreida tell that you Oreida had contacted Amalgamated Sugar about you?

A No. They just said they would, but as far as if they did or not, I have no idea.

Q Do you know if anyone for Amalgamated Sugar was in contact with any of your subsequent employers or any of the companies you applied for work at?

A Just what I told you about the beet dump.

Q Right.

A That's the only time.

Q Okay. So you don't know of any communications between anyone at Amalgamated Sugar and any other employer regarding you; is that correct?

A Correct.

MR. GAVRE: I don't think I have any further questions at this time.

MR. CARR: No questions.

MR. GAVRE: How do you want to handle signing, any suggestions? Send it to him with instructions? Do you want to have it sent directly to Mr. Sparrow?

MR. CARR: Or you can send it to us and--probably send it to us.

THE WITNESS: It will be best to send it to you because I'm moving real soon.

(Whereupon, the taking of the deposition was concluded at 4:30 p.m.)

--ooOoo--

Tab 3

INFORMATION SHEET FOR THE TWIN FALLS FACTORY

SAFETY

1. Work as safely and carefully as possible. If you are not sure if something is safe, ask your Foreman.
2. Report all injuries, no matter how small, to your Foreman and the First Aid Station in the Factory Lab immediately. All visits to the doctor or hospital for work related injuries require prior approval of the Safety Director.
3. In each work area, there is a list of special safety equipment needed in that area. You are responsible for checking out and using this equipment. The safety equipment is located in the Storeroom or Tool Crib.

ATTENDANCE

1. You must come in, on time, every day your shift is scheduled to work. If you will be late, or absent, you must call in to the factory to report it. Phone numbers are 733-6888 or 733-4104. Failure to do this is grounds for immediate dismissal. It is <u>your responsibility to get to work and be on time.</u> All reasons that you may choose to miss work for may not be excused. For example if you do not have a ride to work and you miss the full shift this absence will be unexcused. It is your responsibility to clear all absences with your supervisor. The maximum number of unexcused absences you can receive before being terminated is three (3).

GENERAL INFORMATION

1. No pay advances will be given.
2. The time clock and most lockers are in the locker room. Please keep all personal belongings in your locker that you do not need at your station.
3. Lunch and break periods will be scheduled by your Foreman. Where breaks are authorized away from the work station they are limited to ten (10) minutes <u>maximum</u> and lunch is thirty (30) minutes <u>maximum.</u>
4. You may park your car in an unmarked spot in the parking lot. LOCK YOUR CAR. <u>Employees are not allowed in the parking lot during working hours.</u>
5. Phone calls are permitted only during breaks and only from the pay phone in the locker room.
6. With a few exceptions, everyone will be on a rotating shift. Your scheduled days off will be according to what shift letter you are assigned to.
7. All new employees are on probation for forty-five (45) days.
8. The Storeroom is located in the center of the factory.
9. Anyone completing campaign will be offered a campaign job next year before anyone new is hired.
10. At the end of campaign, there may be a few intercampaign positions available. They will be given to the campaign workers who show an interest in year round employment, have a skill we need, have established good work habits which includes good attendance.
11. Radios, tape recorders, etc. are not permitted in the Factory. [illegible] on the back of the time card are in effect and

Tab 4

AGREEMENT

between

The Amalgamated Sugar Company

and

The American Federation of Grain Millers Local Unions Nos. 282, 283, 284 & 290

Affiliated with the AFL-CIO

TERM AUGUST 1, 1993 TO JULY 31, 1996

(a) quit, retires, or
(b) is discharged for just cause, or
(c) fails to report within the reasonable time specified in the notice for Campaign employment, which notice will be sent to the last address he has furnished to the Company.

13.3 *SENIORITY LISTS:* The Company will provide two seniority lists at each factory on February 1, April 1, June 1, and September 1 of any year. In addition, the Company will provide seniority lists at other reasonable periods providing notification is given the Factory Accounting Manager on a timely basis before the end of a payroll period. One seniority list would be for Regular Employees and one would be for Non-Regular Employees. The Regular Employee list will be based on the number of hours of continuous service. The Non-Regular seniority list will be based on the number of months of Campaign worked. These lists will be posted for thirty (30) days for corrections and, if no objections are made, will be accepted as authentic lists. The appropriate Union officer shall be furnished a copy of both lists.

ARTICLE 14
DISCIPLINE AND DISCHARGE

14.1 The Company has the right to discipline or discharge employees for just cause. Discharge shall be evidenced in writing which shall state the reason for the discharge and shall be given to the employee at the time of his discharge. An employee who believes his

discipline or discharge is not justified shall have recourse to the grievance procedure under the Agreement.

14.2 Written warnings are not required nor forbidden by this Article. A copy of all written warnings (Incident Report Form) and discharge notices will be given to the Union. The Union will acknowledge receipt of such copy by initialing the Company copy of the notices. Employee's signature does not constitute personal admission of guilt, but acknowledges receipt of document.

ARTICLE 15
EMPLOYEE REPRESENTATION

15.1 *STEWARDS:* The Local Unions may designate at least three (3) of their members to act as Stewards. Such Stewards shall not assume any of the duties or powers of a supervisor. They shall be empowered by the Union to aid in adjusting grievances between employees and the Company. All grievances involving employees shall be adjusted whenever possible between the immediate supervisor or the foreman under them, and the Employee Steward. In case they are unsuccessful in their efforts to adjust grievances with these officials, the grievance shall be submitted to the Employee's Committee hereinafter provided for.

15.2 *EMPLOYEES' COMMITTEE:* The Local Unions agree to designate from their membership a workmen's committee of three (3) employees whose name shall be posted on the Bulletin Board.

15.3 *GRIEVANCE PROCEDURE:*
Step 1. An employee claiming a grievance shall put his grievance in writing to his Steward within five (5) scheduled working days of the Employee's knowledge of the occurrence to be grieved. The Steward shall attempt to settle the grievance through discussions with the Grievant and his immediate supervisor. Within two (2) scheduled work days after receipt of the grievance, the Steward shall notify the Employee's Committee that he has not succeeded in a settlement of the grievance.

Step 2. If the Steward has failed to settle the grievance with the immediate supervisor in Step 1, the Employee's Committee within three (3) scheduled working days after receiving the grievance from the Steward, shall pass upon the grievance. In the event the Employee's Committee decides the grievance is entitled to further consideration, they shall within two (2) scheduled work days submit the written grievance to the Local Management. The grievance shall briefly state the nature of the grievance, violation alleged and settlement request. The Second Step hearing will be held within five (5) scheduled work days of the receipt of the written grievance from the Employee's Committee. The Company shall give the Union a written decision within five (5) scheduled work days of the Step 2 hearing. Discharge grievances will start in Step 2 and must be submitted directly to the Employee's Committee within five (5) scheduled work days from the time the employee receives the written notice of discharge.

Step 3. In the event the grievance is not settled in Step 2, either party, if they so desire, may within five (5) scheduled work days after the

receipt of the second step answer, refer the grievance to the International Representative and/or the appropriate Company Official for further handling. If a satisfactory agreement cannot be reached between the International Representative and appropriate Company Official with thirty (30) days, it will then be referred to the local Union before proceeding into the arbitration procedure. Time is of the essence and all grievances must be handled within the prescribed time limits set forth herein. Failure to do so shall constitute forfeitures of the written grievance by either party failing to do so. Time limits may be extended by mutual agreement between the parties.

15.4 *ARBITRATION PROCEDURE:* If a grievance is to be carried to arbitration, either the Company or the Union shall notify the other party of its intention by Certified Mail within two (2) weeks after the parties have determined that a satisfactory settlement cannot be reached.
If the Company and the Union are unable promptly to agree upon an impartial arbitrator, the parties will request a list of arbitrators from the Federal Mediation and Conciliation Service. The impartial arbitrator shall be designated in accordance with the procedures of the Federal Mediation and Conciliation Service.
The Arbitrator shall have authority to act only with respect to grievances relating to the interpretation or application of the provisions of this Agreement and his decision shall be final and binding on all parties involved.
Each party shall pay its own expenses incurred in arbitration. The fees and expenses of the Arbitrator shall be borne equally by the Company and the Union.

15.5 *EMPLOYEE REPRESENTATION:* A Union representative may be present at meetings involving disciplinary action by the Company if requested by the Employee.

ARTICLE 16
STRIKES AND LOCKOUTS

16.1 It is mutually agreed that during the life of this Agreement if both parties to same abide by the terms of this Agreement there shall be no cessation of work of the employees or action in any form taken or permitted by them impairing Employer's operation or affecting the distributions of his product, nor shall there by any lockout by Employer.

ARTICLE 17
SEVERANCE PAY

17.1 *SEVERANCE PAY GRANTED:* In the event the operation of the sugar producing facilities of any of the plants covered by this Agreement is to be permanently discontinued by the Company, all Regular Employees, at the affected factory, with three or more years of continuous service shall be granted severance pay, unless the Company or its successors offers the Employee employment either at the same or other location at a similar or reasonable rate of pay. The Employee will have the option of accepting the transfer to another factory or accepting severance pay.

17.2 *BENEFITS ALLOWED:* An eligible employee who has completed three (3) full years

of continuous service shall receive severance pay of one (1) week's pay (40 hours) based upon the regular straight time base wage rate received by the Employee at the close of the last Campaign prior to the discontinuance of that factory operation. For each additional year of continuous service, an eligible employee will receive one (1) week's pay, on the same basis as indicated above, up to a maximum of thirteen (13) weeks severance pay. It is understood that upon receipt of severance pay, and employee relinquishes all recall, seniority, and employment rights with the Company.

ARTICLE 18
MISCELLANEOUS

18.1 *BULLETIN BOARDS:* The Company shall furnish employees suitable places for the posting of notices and bulletins pertaining to employee and Company affairs. Notices posted on the Union Bulletin Boards by the Union must bear the signature of the President or Secretary of the Local Union.

18.2 *UNION AFFAIRS:* It is agreed that no Union activities or Union business of any kind be carried on by Stewards or other Union members during the time they are gainfully employed on shift by the Company. It is further agreed that Stewards or other Union officers may, if they wish, solicit Union members, collect membership dues, contact new employees, or otherwise carry on Union business in the Company locker room prior to and after the close of each shift, providing all parties concerned are off shift. In case of emergency,

Tab 5

CX NUMBER WCCU 601 DATE 2-16-95 FACTORY [illegible]

Bound Seal #'s (Top of Car)

AGM AC76560
AGM AC76555
AGM AC76558
AGM AC76559
AGM AC76561
AGM AC76562

(Bottom of Car)

GM079213
GM079215

IT
2:00
1:50
PLACE
[illegible]
TION
EMP 29°
TEMP 29°

INITIAL INSPECTION

	Yes	No
A. Amalgamated or customer-assigned car?	☒	☐
B. Inbound seals in place? If missing, how many? Top__ Bottom__	☒	☐
C. Gates/hatches closed? If open, how many? Top__ Bottom__	☒	☐
D. Gate shields in place? If open or damaged, how many?____	☒	☐
E. Air caps in place? If missing, how many?____	☒	☐
F. Mechanical condition satisfactory for use (brakes, ladder, couplers)?	☒	☐

Signature - Locomotive Operator: [illegible]

CAR CLEANING REPORT

Car Cleaned By: [illegible] Date 2-16-95

	Yes	No
A. Sanitary condition satisfactory?	☒	☐
B. Hatches, gates, sanitary shields clean and free of crusted sugar and working properly?	☒	☐
C. Interior free of trash, soil, insects, paint chips, and abnormal odors?	☒	☐
D. Body cracks absent?	☒	☐
E. Water marks or roof leaks absent?	☒	☐
F. Airslide fabric intact, no holes?	☒	☐
G. Sugar removed? How much? 100 Pounds	☒	☐
H. Car is clean and ready for loading?	☒	☐

Signature - Car Cleaner: [illegible]

CAR LOADING REPORT

Car Loaded By: BLAKE WADDLE Date 2-16-95

	Yes	No
A. Inner gate is in closed position?	☒	☐
B. Hatch rims are clean and free of crusted sugar?	☐	☐
C. Before closing hatches, checked for contamination on top of sugar?	☐	☐
D. Hatches and gates are protected with plastic?	☐	☐
E. Three-way valves in closed position?	☐	☐
F. Top of car is clean. Loose sugar and tools removed?	☐	☐
G. Sample of sugar provided to Laboratory?	☐	☐
H. Car is ready for final inspection?	☐	☐
I. Was car dehumidified? Relative humidity level in car____%	☒	☐

Car temp after loading____ Grains H_2O/lb____

Signature - Bulk Loader: [illegible]

FINAL INSPECTION AND APPROVAL FOR SHIPMENT

Date: 2-20-95 Time: 4:00 AM Customer: [illegible]

Location: [illegible]

	Yes	No
A. All seals in place, locked, verified	☐	☐
B. Gate shields and hatches protected with plastic?	☐	☐
C. Top of car is clean?	☐	☐
D. Three-way valves closed? Air caps in place?	☐	☐
E. All canvases and bags accounted for?	☐	☐

DEPOSITION EXHIBIT 2 Agnew

Out Bound Seal #'s (Top of Car)

1. AGM 156587
2. 156588
3. 156589
4. 156590
5. 156591
6. 156592
7. 156597
8. 156598
9. 156599
10. 156600
11. 156601
12. 156602
13. ____
14. ____
15. ____

(Bottom of Car)

1. AGM 156593
2. 156594
3. ____
4. ____
5. ____
6. ____
7. ____
8. ____
9. ____
10. ____
11. ____
12. ____
13. ____
14. ____
15. ____

◆ ◆ ◆ ◆ ◆ ◆ ◆ ◆

QUALITY ASSURANCE

Sugar meets customer specifications?

Yes ☐

No ☐

Chemist initials____

Date____

Tab 6

SHIP DATE 02-Mar | ARR DATE | PICKUP DATE

INTERNATIONAL : DIST.
P.O. BOX 22106
ST. LOUIS
MO 63116-0106

INTERNATIONAL INGREDIENT CORP.
204 PEMBLETON DRIVE
MARSHALL TOWN
IA 50158

Date 01-Mar-95
02:09 Ph

Cust ID # 04290-0201-7
Contract #
Release #

Broker TASCO
Broker ID # 99
Broker Rel #
Car/TH #
Move Date
Weight 61692

SHIPPING COPY

04 1250 UNITS BULK FINE GRAN 1250 CWT

FOR ANIMAL FEED ONLY

TOTAL: 1250 CWT

SMALL AIRSLIDE/1250
BILL TO WP 11601- ANIMAL FEED ONLY!

DEPOSITION EXHIBIT 6 Sparrow

1250 00

BULK CAR LOADING CHART

DATE LOADED 2-16-95
LOT 5T047
SILO NUMBER 4K
CAR INITIAL & NO. WP 11601
STENCILED LIGHT WT 57400
DATE & PLACE CAR LAST LIGHT WEIGHED PC 2-84
LOAD LIMIT 162600
SEAL NUMBERS Void AGM 156587 THRU AGM 156594 ADD 156591 THRU 156605

INSPECTION PROCEDURE

	NAME	DATE	TIME
CLEANED	B SHIFT	2-15-95	
PRE-LOAD	BLAKE HADDOCKS	2-16-95	7:00 AM.
INSPECTION			
FINAL INSPECTION AND SEALED			

TIME TAKEN TO CLEAN EMPTY CAR 1.3 HR.
NORTH ____ SOUTH ✓

BULK CAR LOADER BLAKE HADDOCKS

116596
116597
116598

Tab 7

EXHIBIT 7 Sparrow

1995 EMPLOYEE WORK ABSENCE RECORD

NAME: James Sparrow EMPLOYEE NO.: 44244

JANUARY

SUN	MON	TUES	WED	THUR	FRI	SAT
1	(2)	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30	31				

FEBRUARY

SUN	MON	TUES	WED	THUR	FRI	SAT
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	(20)	21	22	23	24	25
26	27	28				

MARCH

SUN	MON	TUES	WED	THUR	FRI	SAT
			1	2	3	4
5	X	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	X
26	27	28	29	30	31	

APRIL

SUN	MON	TUES	WED	THUR	FRI	SAT
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30						

MAY

SUN	MON	TUES	WED	THUR	FRI	SAT
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	X
X	22	23	24	25	(26)	27
28	(29)	30	31			

JUNE

SUN	MON	TUES	WED	THUR	FRI	SAT
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	

JULY

SUN	MON	TUES	WED	THUR	FRI	SAT
						1
2	(3)	(4)	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30	31					

AUGUST

SUN	MON	TUES	WED	THUR	FRI	SAT
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

SEPTEMBER

SUN	MON	TUES	WED	THUR	FRI	SAT
					(1)	2
3	(4)	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30

OCTOBER

SUN	MON	TUES	WED	THUR	FRI	SAT
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30	31				

NOVEMBER

SUN	MON	TUES	WED	THUR	FRI	SAT
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	(23)	24	25
26	27	28	29	30		

DECEMBER

SUN	MON	TUES	WED	THUR	FRI	SAT
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	(25)	26	27	28	29	30
31						

	TOTAL
ICK LEAVE (RED)	
VACATION (BLACK)	3-16 (12)
EXCUSED ISENCE (BLK)	
INDUSTRIAL CIDENT (PUR)	
LEAVE OF SENCE (BLK)	
CUSED ABSENCE (OR)	3-25 (12) 5/10 (12) 5/24 (12)
TE (BLUE)	
O (BROWN)	
L GAURD (BLK)	
RAL LEAVE (BLK)	

1994 EMPLOYEE WORK ABSENCE RECORD

NAME James Sparrow EMPLOYEE NO. 44244

JANUARY

SUN	MON	TUES	WED	THUR	FRI	SAT
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30	31					

FEBRUARY

SUN	MON	TUES	WED	THUR	FRI	SAT
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28					

MARCH

SUN	MON	TUES	WED	THUR	FRI	SAT
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

APRIL

SUN	MON	TUES	WED	THUR	FRI	SAT
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30

MAY

SUN	MON	TUES	WED	THUR	FRI	SAT
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30	31				

JUNE

SUN	MON	TUES	WED	THUR	FRI	SAT
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30		

JULY

SUN	MON	TUES	WED	THUR	FRI	SAT
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30
31						

AUGUST

SUN	MON	TUES	WED	THUR	FRI	SAT
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30	31			

SEPTEMBER

SUN	MON	TUES	WED	THUR	FRI	SAT
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	

OCTOBER

SUN	MON	TUES	WED	THUR	FRI	SAT
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30	31					

NOVEMBER

SUN	MON	TUES	WED	THUR	FRI	SAT
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30			

DECEMBER

SUN	MON	TUES	WED	THUR	FRI	SAT
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

	TOTAL
SICK LEAVE (RED)	12
VACATION (BLACK)	13
EXCUSED ABSENCE (BLACK)	
INDUSTRIAL ACCIDENT (PURPLE)	
LEAVE OF ABSENCE (BLACK)	
UNEXCUSED ABSENCE (BLACK)	4
LATE (BLUE)	
OLO (BROWN	
NAT'L GAURD (BLACK)	
FUNERAL LEAVE (BLACK)	

A000007

Tab B

IN THE SECOND JUDICIAL DISTRICT COURT OF

WEBER COUNTY, STATE OF UTAH

BLAKE WILLIAM WADDOUPS and JAMES EDWARD SPARROW, JR., Plaintiffs, vs. THE AMALGAMATED SUGAR COMPANY, a Utah corporation, et al., Defendants.	Case No. 950900441 Judge Stanton Taylor DEPOSITION OF: **BLAKE WILLIAM WADDOUPS**

The deposition of **BLAKE WILLIAM WADDOUPS**, a witness in the above-entitled cause, taken before LANETTE SHINDURLING, Registered Professional Reporter and Notary Public in and for the State of Utah, at the law offices of PARSONS, BEHLE & LATIMER, 201 South Main Street, Suite 1800, Salt Lake City, Utah, on the 13th day of September, 1996, commencing at 8:30 a.m.

the process of what we're doing here today?

A No.

Q Mr. Waddoups, would you state your full name and address for the record?

A Blake William Waddoups, HC66 Box 3-C, Declo, Idaho, 83323.

Q Is that the address you just gave, is that a mailbox or is that where you actually live?

A That's a mailbox.

Q Okay. And where is your residence?

A It's close to that. It's in the country.

Q Okay. You live somewhere in the vicinity of Declo, Idaho?

A Yes.

Q How long have you lived there?

A For approximately-- right at about a year.

Q Okay. And where did you live before that?

A Twin Falls, Idaho.

Q And where in Twin Falls, Idaho?

A I can't remember the address. 588 1/2 Adams, yes.

Q Okay. And how long did you live there?

A For seven years.

Q Mr. Waddoups, are you currently employed?

A Yes, I am.

Q And where do you work?
A I work through Express Personnel Services.
Q What is Express Personnel Services?
A A temporary personnel services.
Q And where is that based or where does it have an office that you use?
A Burley, Idaho.
Q Okay. And are you working on a particular job through this temporary service?
A Yes.
Q Okay. Where are you working now?
A For Darrell's Welding.
Q Where is Darrell's Welding?
A 165 500 South, Burley, Idaho. 165 East, I guess it would be.
Q And how long have you worked at that place?
A Approximately six months.
Q And how much are you being paid on that job?
A $8.50 an hour.
Q Are you receiving any benefits on that job?
A Through Express I've got very minimal insurance that will cover my newborn child.

Q So you have some medical insurance?
A Yes.
Q Does the medical insurance cover you as well?
A Yes.
Q And does it cover your wife?
A I'm still not sure on that one. We're not legally married.
Q Excuse me?
A We're not legally married at this time.
Q Okay. But you have a child?
A Yes.
Q And your current medical insurance does cover your child?
A Yes.
Q Do you have more than one child?
A No.
Q Are you currently looking for any other work?
A I can't answer that. I haven't thought about it.
Q Okay. But I take it you're not right now actively searching for another job?
A At this exact moment, no, I'm down here.
Q But you said you had been working for

about six months at a welding company.

A Yes.

Q And do you anticipate that that job will continue for a while?

A Not necessarily. I'm on through a temporary agency.

Q Okay. So have you, while you've been working at this welding company, have you been looking for any other job besides the one you're on?

A Yes. Earlier in working for him I looked for other welding, you know, positions. Not in the last probably two months. With the baby and these depositions, he's easy to work for.

Q So I take it you have a new baby?

A Yes.

Q When you were looking for other jobs while you're at Darrell's Welding, do you recall what other jobs you looked for?

A Welding jobs.

Q Do you recall what companies or employers you applied to?

A Idaho Sheet Metal. Mostly just looked in the papers for welding positions opening up. I went in and tried at Kodiak in Rupert and didn't get that job.

Q Is that a welding job?

A Yes.

Q Have you been looking specifically for welding jobs?

A Yes.

Q Is there some particular reason why you're focusing on welding jobs?

A I'm good at it.

Q So you haven't been looking for other types of jobs except for welding jobs?

A Yes.

Q Now, you said that you were good at welding. Did you get some training in welding or do you have prior job experience as a welder or how is it that you're good at welding?

A It's just naturally something that you can do or you can't do.

Q Okay. When did you first do welding as a job?

A As a job?

Q Yes.

A That would have been November of last year. I came down to Ogden, lived with my parents and was working for Integra Manufacturing in Clearfield at the Freeport Center.

Q What was the company again?
A Integra.
Q What kind of company is that or what kind of business is that?
A It's a manufacturing company. A lot of welding goes on.
Q And so when did you start working at Integra at Clearfield?
A When?
Q Yes.
A In November of last year.
Q November of '95?
A Yes.
Q And how long did you work there?
A Approximately a month and-a-half.
Q Okay. What happened after a month and-a-half?
A They laid off swing and graveyard crews. I was on graveyard.
Q So you got laid off?
A Yes.
Q Okay. In terms of employment, what did you do after you got laid off by that company?
A I went back to Declo and got a job through Express within a matter of hours.

Q Okay. So I'm trying to figure out just the time frame. If you got that job in Integra in November of '95, is that what you said?

A Yes.

Q So was it in December of '95 when you got laid off?

A Yes, approximately the 28th. Right after Christmas.

Q Okay. So you went back to Declo and you got a job within, you said, a few hours?

A Yes.

Q Do you recall what company you worked for?

A I went to work for John Smith, he owns an implement company, welding for him.

Q Okay. And where is his company?

A Burley, Idaho.

Q And how long did you work for John Smith?

A Off and on for probably two months.

Q When you say off and on, you mean it wasn't a regular job?

A It was not a full-time position.

Q Was it a part-time position where you worked a few hours each day?

A No. It was a week here, a week there, a few days there.

Q Okay.

A It's a temporary service that sent me out on it.

Q Right. Did you have any other work during the period you were doing the sort of on and off work for John Smith?

A Not that I can recall.

Q And when did your work for John Smith come to an end?

A Boy, it had to have been around March somewhere.

Q Of 1996?

A Yes, of this year.

Q And then what did you do for work after that?

A I then, around then got on with Darrell's Welding. It was a few weeks later.

Q So were you unemployed for a few weeks?

A Yes.

Q Did you collect any unemployment benefits during that period?

A Yes, I did.

Q Do you recall how many weeks of unemployment benefits you have received?

A Overall, probably six. That spanned some

time into working for John Smith.

Q Okay. So when you say overall six weeks of benefits, you don't mean they came in a six-week block?

A No.

Q But it came on more than one occasion?

A Yes.

Q But your recollection is it totaled about six weeks?

A Yes.

Q Okay. So then you went to work for Darrell's Welding, and that's where you're working today?

A Yes.

Q Okay. Let's go back a little bit further in time. My understanding is you left Amalgamated Sugar what, the end of May 1995?

A Yes.

Q And then you've described working in Utah in late '95?

A Yes.

Q Tell me what jobs you had after leaving Amalgamated Sugar up to the time you got that job in Clearfield that you described.

A It was a few months after I was laid off,

fired, excuse me, a few months after I was fired I took a temporary job through Intermountain Staffing in Twin Falls. That lasted a few weeks and then I was unemployed again.

Q What kind of job was that that you had through Intermountain Staffing?

A I worked at Plastic Slip Sheets USA.

Q What kind of work did you do there?

A I was mixing their plastic resins for their process.

Q Okay. And why did that work come to an end?

A I decided to leave Twin about that time.

Q So you voluntarily quit that job?

A Yes.

Q And when you left Twin Falls where did you go?

A To Declo.

Q Okay. How far is Twin Falls from Declo?

A Approximately 50 miles.

Q So after you moved to Declo then did you have a job in Declo when you moved there?

A Not when I moved, but shortly afterwards, yes.

Q And what job was that?

A I went through Express Personnel and they had a few little ones once in a while for a few days, different-- just any job.

Q You don't recall, though, right now?

A I worked for Petersen Construction for about a week and-a-half, two weeks. I worked for Rain for Rent for approximately three weeks.

Q Why did these jobs come to an end?

A They were a temporary job. The work was done.

Q You earlier said that you moved from Twin Falls to Declo. Why did you leave Twin Falls?

A Because of the way I had been treated and the way I felt in Twin Falls.

Q When you say by the way you were treated, what are you referring to?

A I'm referring to Michael Davis's death.

Q Okay. Now, you said you moved to Declo and you got a few jobs?

A Yes.

Q And then did you get any additional jobs while you lived in Declo?

A What do you mean, additional?

Q Well, you said you had a few jobs and you described a couple of them and then at a later point

you moved down to Ogden and you said you lived with your parents and got a job in Clearfield. So have you described all the jobs that you had while you were at Declo?

A I believe so. I don't recall any others.

Q So, then, when did you move down to Ogden?

A In November.

Q And why did you leave Declo for Ogden?

A I was going to come down here and go to welding school and get a job.

Q Okay. Where were you thinking of going to welding school?

A My parents had a few places picked out. I don't even know where they were.

Q Did you actually apply to any welding program?

A No, I hadn't. The job gave out before I had a chance to get into it.

Q Okay. And that's the job in Clearfield that you referred to?

A Yes.

Q But are you saying that when you were in Declo and you decided to move to Ogden, at that point were you already thinking of going to welding school?

A Yes.

Q And was that why you moved to Ogden, to be closer to some welding school?

A It's where I could find a job.

Q Okay. So you actually moved to Ogden first to find a job or to go to welding school? I'm just not clear, that's all.

A To go to welding school, but to do that I had to have a job. I came down on a weekend, I got a job. I went back up, got my stuff and then stayed with the parents for as long as that job lasted.

Q What was it that made you pick Declo as a place to move after you left Twin Falls?

A My mother's brother lives there.

Q So you have family there?

A Yes.

Q Were you living with your family members?

A I was living with my uncle, yes.

Q And are you living with your uncle now?

A No.

Q It's my understanding that after you were fired by Amalgamated you applied for unemployment benefits; is that correct?

A Yes.

(Exhibit 1 marked for identification.)

penalties for false statements made for the purpose of obtaining benefits." Do you see that?

A Yes.

Q Do you recall whether you read that statement at the time you filled out this form?

A I don't remember.

Q Okay. Did you, in fact, fill out this form truthfully?

A To the best of my knowledge, yes.

(Exhibit 2 marked for identification.)

Q (BY MR. GAVRE) Mr. Waddoups, let me show you what's been marked as Exhibit 2, which consists of three pages regarding your claim for unemployment benefits. Why don't you take a minute to look over Exhibit 2.

A (Reviewing document.)

Q Mr. Waddoups, do you recognize Exhibit 2?

A Yes.

Q Looking just at the first page of Exhibit 2, is that filled out in your handwriting?

A Yes, it is.

Q And at the very bottom of the page, does that appear to be your signature? I know it's a bad copy, but this is the best I could get.

A There is no signature on this.

Q There's not? Okay. I was looking at this part down here. Does that-- this unfortunately is a xerox of a fax so it's poor quality.

A No, that doesn't appear to be my signature.

Q But you did fill out the first page of Exhibit 2; is that correct?

MR. CARR: May I see that?

THE WITNESS: I believe so.

Q (BY MR. GAVRE) And did you fill out the first page of Exhibit 2 truthfully?

A I believe so.

Q If you would look near the bottom of page 1 of Exhibit 2 there's a paragraph that's unnumbered number 11 and it says, "Additional Claimant Statement." Could you read the handwritten statement into the record?

A It says, "Getting up in the morning after three months of trouble sleeping due to Mike Davis's death that occurred on my shift from equipment that I am empowered to operate on an every day basis. It was hard to do without"-- and it was supposed to say sleep in there somewhere.

Q So it ends with the words "hard to do without," and you think--

correct, the word yes is written in.

A Yes.

Q You signed this statement?

A Yes.

Q So I'm asking you if this is correct, and it is correct, right?

A That's what it says, yes.

Q Question 6 says, "If you were dismissed because of absences, had you been warned your absent rate was reaching unacceptable levels? How many warnings," and it has handwritten into it "2-3 times." Is that a correct answer?

A I guess so.

Q Moving on to the next question, it said, "What time were you scheduled to begin," and it's written in "6:00 a.m." Is that correct?

A Yes.

Q And it goes on, "What time did you call in and let the employer," I believe it says "know you wouldn't be in," and the handwritten statement says, "I called in when I knew I was going to be late." Is that correct?

A Yes.

Q Question 9 says, "What happened on the day of discharge to cause dismissal," and the

about this particular conversation with Vic Jaro?

A I'm not sure. Maybe I will have something later. I can't remember anything right at this moment.

Q Okay. You said something to the effect that you asked Vic Jaro how he would like you to go to the public with this issue?

A That's not what I said.

Q Okay. Tell me what you said.

A I asked him how he would feel about the public knowing about the way they've contaminated the silo and continued shipping as a food grade product with blood in it.

Q Okay.

A That was about all I said.

Q Had you--

A Oh, I did mention the FDA, the news with that as it being the public.

Q Were you saying you were thinking of going to the news or to the FDA?

A I never said that.

Q Okay. So in what respect did you make reference to the FDA or the newspaper or the news?

A I asked him how he would like that personally, where it would put his job.

as he was absent.

Q Do you know why he was absent?

A I couldn't speculate on that.

Q Okay. You mentioned a Bobby Stone?

A Bobby Smith.

Q Bobby Smith, excuse me. Who was Bobby Smith?

A He worked out in the mill on the same shift I did before I transferred out to the sugar warehouse.

Q When did you transfer to the sugar warehouse?

A I can't remember the exact time. It's when I went to do bulk load there, it must have been '94, I believe, '94-'95. I can't remember.

Q How long were you a bulk loader?

A I bulk loaded off and on through juice runs and summers off and on for probably eight years, but I had other jobs at the same time in the mill.

Q I'm a little confused. Bobby Smith worked in the mill; is that what you said?

A Yes.

Q And you worked in the sugar warehouse as a bulk loader?

A Towards the end, yes, but I had worked with him out in the mill.

Q And did the people in the mill work the same kind of shifts that the people in the warehouse worked?

A Yes, they did.

Q And so what are you saying about Bobby Smith, that he too was late for work?

A I know that he missed a lot of time.

Q By missed a lot of time you mean what?

A I mean a lot of time. As far as I know, he had been, I guess, let go or whatever and brought back once before.

Q Okay. I'm just trying to get it clear. When you say missed a lot of time, do you mean he missed days or late coming to work or was absent?

A Yes, that's what I mean.

Q Which of those things?

A All of those.

Q And how would you know that Bobby Smith was being late to work?

A I answered that question. I worked with him in the mill.

Q Okay. And are you saying you would see him come in late?

Q You don't recall it being distributed to you?

A Not that I can remember, no.

Q Do you recall seeing any similar kinds of memos from the company about attendance, etc.?

A Not necessarily, no.

Q Mr. Waddoups, after you came to work at Amalgamated Sugar did you join a union?

A Yes, I did.

Q Do you recall the name of the union?

A AFL-CIO.

Q Is there a particular name for the union that was there within the AFL-CIO?

A Grain Millers.

MR. CARR: I'm sorry?

THE WITNESS: Grain Millers.

Q (BY MR. GAVRE) And was there a labor agreement between the grain millers union and Amalgamated Sugar?

A Yes.

Q And that labor agreement covered you?

A I guess so.

Q And did you ever receive copies of the labor agreement?

A I received one.

Q Okay. Did it come in a little booklet?

A Yes.

Q Did you read that labor agreement?

A I read quite a bit of it, yes.

(Exhibit 9 marked for identification.)

Q (BY MR. GAVRE) Mr. Waddoups, let me show you what's been marked as Exhibit 9. Let me tell you that this is a few pages out of the labor agreement between your union and Amalgamated Sugar covering the '93 to '96 period. Does Exhibit 9 look familiar to you?

A Well, I can tell you've copied it out of a real book.

Q Yes. It's a copy out of a small pamphlet. Does it look familiar to you?

A Not this one, but I know where you're heading, yes.

Q Did you know that under the labor agreement that covered you at Amalgamated that there was a just cause standard for discharge?

A No, I don't.

Q Mr. Waddoups, if you would turn in to page 45 of Exhibit 9, it's about four or five pages in, do you see that?

A Uh-huh (affirmative).

MR. GAVRE: Make the objection.

MR. CARR: I object to the form of the question in that it's vague and ambiguous. It's not clear whether you're asking him whether he read the words "just cause" in Exhibit 9 or whether he has formed an opinion as to what just cause is. And if it's the latter I object on the basis it calls for a legal conclusion.

Q (BY MR. GAVRE) I'm not asking for your interpretation of this agreement or what you think just cause means, I'm just really asking you about this labor agreement. And I'm reading it as you are and it says that "The company has the right to discipline or discharge employees for just cause." I'm just asking you whether you were aware that the labor agreement that covered you while you were at Amalgamated Sugar had a just cause standard for discharge in it?

MR. CARR: Same objection.

THE WITNESS: No.

Q (BY MR. GAVRE) Did you know that the labor agreement contained a grievance process?

A I had heard about a grievance process.

Q Had you ever read about the grievance process in the collective bargaining agreement

Q Do you recall him saying anything at all?

A He said, What are we here for? I told him if the company wanted him to know they would tell him. I didn't think it was my place to tell him that the silos were contaminated with blood and that's why I was having a little bit of a problem there.

Q So you didn't tell Ken Weismore that?

A No, I didn't.

Q Do you recall anything more about what Ken Weismore did or said at this meeting with Larry Dayley?

A I don't believe he did anything.

Q Do you recall him saying anything more than what you've just recounted?

A I don't recall him saying anything.

Q Did you have any other interaction with Ken Weismore?

A No.

Q Were there any other union stewards or any other union officials at the plant besides Ken Weismore?

A When?

Q Well, at any time.

A At all times there's supposed to be one on

is an unexcused absence. Another unexcused absence will result in disciplinary action." Do you recall getting an incident report about an unexcused absence about this time?

A Yes, I do. I had never worked for Breck Griffith a day in my life and he called me into his office and started ragging on me. That's what I remember about it.

Q Do you recall not calling in or not coming in?

A I don't recall.

Q On March 19, 1988?

A I don't recall.

Q So you may have fail had to call in or you may not have, you just don't recall one way or the other?

A I just don't recall. It may have been a screw-up in scheduling. About then they used to start up the juice run when everybody was changing shifts and stuff. I can't remember exactly what that one was.

Q Okay. Did you think about filing a grievance about this incident report?

A I didn't-- still didn't know about grievances. I still don't know about grievances

around there trying to keep that place running and I had-- and it was-- and I had-- and it was hot and miserable and I had a guy up there who was doing some real dangerous things and I got mad and threw him off the station, told him I didn't want him back up there around me and that many people trying to do a job safely.

Q Mr. Waddoups, let me show you what's been marked as Exhibit 15. Why don't you take a moment just to read it.

A (Reviewing document.)

Q Again, this is a document that I don't think you would have seen before.

MR. CARR: Objection, foundation, hearsay.

Q (BY MR. GAVRE) Let me just state that this is a note that Larry Dayley wrote. Let me read it into the record. It's dated 9-28-93, 8 p.m., 2-B Shift. "I, Larry Dayley, verbally warned Blake Waddoups about his poor attendance on the date," and then it's signed by Larry Dayley, Assistant Superintendent. Do you recall Larry Dayley talking to you sometime in September 1993 about attendance?

A Yes, I do. I was not working for Larry Dayley at that time.

Q Okay. But you do recall--

A I was on a different shift. I had no reason to believe-- why he was talking to me.

Q But Larry Dayley did talk to you about poor attendance?

A I remember him coming up and saying something. It was short, it couldn't have been more than five or six words and took off. He was mad.

Q And he was talking to you about your poor attendance?

A I believe that's what he said. It was so quick and so madly thrown at me I couldn't believe-- I didn't know Larry Dayley hardly at all at that time.

(Exhibit 17 marked for identification.)

Q (BY MR. GAVRE) Mr. Waddoups, let me show you what's been marked as Exhibit 17. It consists of two pages. Why don't you take a second to look at it.

A (Reviewing document.)

Q Mr. Waddoups, looking at the first page of Exhibit 17, are those your initials at the bottom of the page?

A I believe so.

Q Do you recognize the first page of Exhibit

A Yes, I did.

Q And then did you ask Bob Kinchelow if you could have a portion of the day off?

A I believe the remainder, yes.

Q And what did Bob Kinchelow tell you?

A He, I thought, said yes. I don't know where he came up with this until he found out that he wasn't actually in charge. Bob Kinchelow was subbing for Otto Schwarz and Bob had been okaying other people's vacations and I thought he said yeah. And come to find out, he wasn't in charge, didn't have the right to let me go and then this came up. Don't figure.

Q When did you find out that Bob didn't have the authority to let you go?

A When I came back.

Q This Exhibit 18 says that Bob told you that you needed to get Vince's approval and that you threw a fit?

A He lied.

Q Who lied?

A Bob Kinchelow.

Q Okay. Did you know that you had received an unexcused absence for this incident?

A I heard I was going to, yes.

A I believe that was the shift. The Larry Dayley shift.

Q That's a 12-hour shift you were working at the time?

A Yes, it is.

Q Were you working at least during days from 6:00 a.m. to 6:00 p.m.? Is that the shift?

A Yes.

Q And on the day of Mike Davis's accident you were working days?

A Yes, I was.

Q And so you started that day at 6:00 a.m. and the shift would normally go to 6:00 p.m.?

A Yes.

Q And then it's my understanding that starting the next day, the day after Mike Davis's accident, you had seven days off; is that correct?

A Yes.

Q And you took those seven days off?

A Yes.

Q And then you returned to work after your seven days off?

A Yes.

Q And it's also my understanding that Mike Davis's accident occurred on a Thursday, February

16, 1995?

A Yes, it did. It happened through my lunch hour, which I had complained to supervisors about having to keep our system running. I was not there to keep an eye on it. I had to-- I was supposed to keep that thing running through lunch while I went to take my break and I complained about that before and I was not happy with it and it really made me not very happy when I find out somebody actually got killed in it after I complained about it.

Q Okay. Can you tell me briefly what your job involved as bulk loader?

A I would go through the orders when I get there, depending on whatever is running, but go through the orders, figure out railroad cars we had in stock that could be brought in for the next loading. And with the system the way it is you have to have the right car in the right end at the right time with the other right car for whatever customers you've got, which is a lot of decision making there to do to make everything work out.

You have to keep them in grade the whole time you're loading them. You have to inspect them before you load them. You have to seal them, the bottoms and the tops before they're shipped out.

And they like the bottoms to be sealed up immediately as soon as you start the car. You have to run the whole system, which I think is around 52 pieces of machinery from one end to the other, you start up the computer board.

You have to take subsequent samples, depending on the quality-- the specifications of that car for the customer, you have to take samples anywhere from every 200 bags to just every 500 bags, plus a composite, plus your start samples. Plus all at the same time you have to run through and set up your own machinery, you have to make sure it's running right, you have to set the sugar. The mixed sugar that you're setting to grade has to be sent to the bagging machines, which comes directly out of the system you're running. You determine which sugar they get because by law it's supposed to be whatever it says on the bag, which company policy says we do that, which they didn't.

A lot of times the sugar was way out of grade and was shipped anyway. Things like that you would find. When you would first come on shift you would find out that they had loaded and sent out truckloads of sugar that's out of grade, which means it does not meet company specs that the company says

is for that. If it says extra fine and they've got coarse sugar in there, that's illegal. They would do that all the time. You would have to come on and fix mistakes. You would have to keep yours in line the whole time there.

The foreman of the shift, in my case it would have been Bob Kinchelow, would have to come up and find out what you were going to load on the bulk loading so he could tell his baggers what to run. But you had to get it all set up so that they had the right sugar going to those bagging machines so you didn't have that mistake in the type of sugar going into the bags.

Q Let me ask about that. As a bulk loader you are in charge of loading rail cars; is that right?

A Yes, bulk sugar.

Q Okay. And then there's also sugar that is being loaded into bags?

A Yes.

Q And are you in charge of that or are you directing that as well or just the loading of the rail cars?

A You are determining what sugar they get to bag. If you've got a certain-- certain cars you

wake him up and he said she had a fight with him and stayed over her parents. I asked him if he went to the doctor and he said no. I asked him if he was coming in and he didn't think so. He said he needed to get his check and pay some bills. I informed him that we needed to be informed of illness and that I considered it unexcused. He said okay."

Do you recall this incident that's described in Exhibit 23?

A Not the way he puts it.

Q Okay. On March 3rd, 1995, did you, in fact, not come in to work that day?

A I don't recall.

Q Okay. Do you recall having back spasms and taking some pain pills or pills of some kind to deal with your back spasms?

A I don't recall. I was asleep at the time.

Q What does that mean, you were asleep at the time?

A I don't recall what happened. I don't know what he said. I really don't care. And if he said I was unexcused I would say okay.

Q Okay.

A There's no use fighting it. They're going to say what they want. They're going to consider

two and-a-half day suspension?

A Yes, I did.

Q And then did you come back to work?

A Yes, I did.

(Exhibit 26 marked for identification.)

Q (BY MR. GAVRE) Mr. Waddoups, let me show you what's been marked as Exhibit 26 and let me ask you a question about this. You'll see at the bottom of Exhibit 26 there's an entry that says "5-28-95. Blake Waddoups, 10:00 a.m., sick." Did you call in sick on May 28, 1995?

A Yes, I did.

Q And did you call in about 10:00 a.m.?

A I don't know when it was. It was after the scheduled time to be there. I had been up ever since the suspension, and coming back to work for two days before this day I was pressured a lot by all bosses, made to feel like I wasn't worth anything, and I was just plain sick from my nerves of having to go in there and deal with these people again.

Q Okay. When you said you felt pressured by the bosses, what do you mean?

A I had been set up once and been warned about it so they could fire me.

about to go in and tell these people that did it to me exactly what my problem was, but I ended up telling them the last day when I ended up turning in all my stuff. I told Vic Jaro that I didn't like the way things were handled and that they should have actually done something and looked after me a little bit. If you go out and start a machinery and you drag somebody into it, you may have a few problems too. Like you said, nobody knows when the accident actually occurred. It could have been me starting that system. And they didn't care. They actually added to every last bit of it. And I hope they go to hell for it.

(Exhibit 27 marked for identification.)

Q (BY MR. GAVRE) Mr. Waddoups, let me show you what's been marked as Exhibit 27. Again, this is something that I don't think you've seen before.

MR. CARR: Standard objection, hearsay, lack of foundation.

Q (BY MR. GAVRE) Let me just state for the record that Exhibit 27 are notes prepared by Larry Dayley. I'll read them into the record. It's dated Sunday, 5-28-95, 6:00 a.m. "Blake Waddoups didn't show up. He finally called in at 9:55 a.m. and said he and his wife had a fight and that she had broke

into his house and shut his alarm off causing him to oversleep. I checked with the lab and he told them he was calling in sick and they said he would have to talk to Bob Kinchelow who transferred the call to me. He did not say anything to either Bob or I about being sick at that time. Larry."

Do you recall on this date of the 5-28-95 speaking to Larry Dayley by phone?

A Yes, I do.

Q Do you recall telling him that your wife had turned off your alarm clock and caused you to oversleep?

A I told him that I had personal problems. I didn't know why the alarm didn't go off, but I had overslept. I had called in sick because I wasn't feeling well. I don't know how he added the rest of this up.

Q Okay. So you don't recall telling him that--

A It may have sounded something to that effect when he heard it. I don't know what he was thinking at that time. I know I was sick to my stomach, I was just not feeling good and I hadn't felt good for quite a while.

Q Had you and your wife had a fight?

Amalgamated Sugar have been in contact?

A I wouldn't have any idea.

Q Okay. Did you ever ask Amalgamated Sugar for a reference or ask Amalgamated Sugar to talk to any employer or prospective employer?

A No. I wouldn't, not after I heard what they said to James.

Q Okay. So as far as you know, Amalgamated Sugar has not been in contact with any of your employers since--

A As far as I know.

Q Do you know if Amalgamated Sugar has been in contact with any of the companies you applied at?

A I would not know that.

MR. GAVRE: Okay. I have no further questions.

MR. CARR: I have nothing.

MR. GAVRE: Thank you, Mr. Waddoups.

(Whereupon, the taking of the deposition was concluded at 6:23 p.m.)

--ooOoo--

IN THE SECOND JUDICIAL DISTRICT COURT OF

WEBER COUNTY, STATE OF UTAH

BLAKE WILLIAM WADDOUPS and JAMES EDWARD SPARROW, JR., Plaintiffs,	Case No. 950900441 Judge Stanton Taylor
vs.	DEPOSITION OF:
THE AMALGAMATED SUGAR COMPANY, a Utah corporation, et al., Defendants.	**BLAKE WILLIAM WADDOUPS**

The deposition of **BLAKE WILLIAM WADDOUPS**, a witness in the above-entitled cause, taken before LANETTE SHINDURLING, Registered Professional Reporter and Notary Public in and for the State of Utah, at the law offices of PARSONS, BEHLE & LATIMER, 201 South Main Street, Suite 1800, Salt Lake City, Utah, on the 13th day of September, 1996, commencing at 8:30 a.m.

Tab 2

Department of Employment
State of Idaho

CLAIMANT/EMPLOYER SEPARATION STATEMENT

Idaho Department of Employment Rule 09.30.521. OBTAINING SEPARATION INFORMATION. Unless separation information is provided by other means, such as a mass layoff list, a notice of the filing and a request for separation information must be completed and mailed to the claimant's last employer and each next preceding employer until wages received by the claimant equal or exceed sixteen times his weekly benefit amount. Further, it shall be the responsibility of the person claiming benefits to provide the Department of Employment with the employer's name, correct mailing address, dates of employment, type of employment performed and gross earnings from each such employment.

1 BLAKE W. WADDOUPS
Claimant's Name
588½ ADAMS
Address
TWIN FALLS ID. 83301
City State Zip Code

2. 528-31-8291
Social Security Number

3. AMALGAMATED SUGAR CO.
Name of Employer
BOX 127
Address (Street or Box Number)
TWIN FALLS ID. 83301
City State Zip Code

RECEIVED BOISE
JUN 5 1995
CO., INC.

Cost Center 0370 Auth by 115
☒ NC ☐ AC ☒ UI ☐ FSE
Effective Date: 5-28-95
File Date: 6-2-95
Erngs: Requal: Issues:
Change? Chargeability ERP Contacts
Last Employer:

4. Employer Telephone # 733-4104

5. I began working for this employer on 10-85, and the last day I worked was 5-27-95

6. My total gross earnings for the period were at least $ _____. My final rate of pay was $ 11.01 +BENEFITS per HR.

7. Type of work performed BULK LOADING. My immediate supervisor was LARRY DAYLEY

8. **The reason I became unemployed was:** ☐ Laid Off Due to Lack of Work ☐ Quit ☒ Discharged ☐ Other
☐ Business Closure ☐ Still working, reduction in hours available.

IF you quit your job, complete item 9. IF you were discharged, complete item 10. IF Other, complete item 11.

9a. I *quit* my job because _____

b. If you left because of working conditions, describe the situation in detail _____

c. What did you do before quitting to resolve the problem? (For example, did you ask for a transfer or a leave of absence, file a grievance o talk to your supervisor?) _____

DEPOSITION EXHIBIT 2 Walker
FENCAD Reporting, N. J.

10a. I was *discharged* by (Name of Person) LARRY DAYLEY (Title) ASST. SUP.
because I WAS LATE AND HAD BEEN WARNED

b. If you were discharged for violation of a company or union rule, please explain. 3 STRIKES YOUR OUT

c. Had your employer ever warned you about the conditions causing your discharge? ☒ Yes ☐ No If "Yes," when were you warn and by whom? ?

11. Additional Claimant Statement: GETTING UP IN THE MORNING AFTER 3 M OF TROUBLE SLEEPING DUE TO NINE DAYS' DEATH TH OCCURRED ON MY SHIFT FROM EQUIP. I AM ENPOWERED OPPERATE ON AN EVERYDAY BASIS, WAS HARD TO DO WITHO

I certify that the statements made on this form are true and complete to the best of my knowledge and belief and are made in good faith for the purpose of obtaining unemployment insurance, knowing that the law provides penalties for false statements or wi

hat reason/reasons was given for the discharge? Because of lateness

ould you have continued working had you wanted to? N/O

Who discharged you? Larry Dayley, Asst Supervisor 5-27
name title LAST DAY WORKED

you discuss your dismissal with your employer/supervisor? Yes If so, what was the results of that
in fact - I did not reason to be late with [illegible]
tell the truth of a co-worker.

Were you give written ____ or verbal ____ notice of dismissal? both

If dismissed for violation of company rules, were you aware of them (per employee's handbook, po
)? Yes Were you issued an employee hand book or copy of company policy at the ti
I don't know

Had you been warned before about your conduct? Yes If so, who warned you? Dept Supv
and how many times? 5

If you were dismissed because of absences, had you been warned your absence rate was reaching u
els? ____ How many warnings? 2-3 times

If you were discharged for not reporting to work as scheduled, did you call in and give your empl
ice? ____ If not what was the reason for not giving notice?

What time were you scheduled to begin: 6 AM What time did you call in & let the employe
uldn't be in? [redacted] I called in when I knew I was g
to be late

What happened on the day of discharge to cause the dismissal? I was late + also
in an incident in the way I work. I called in
knew I was late + that was before I
knew I was to get them done.

0. Please provide any other information you feel may help in resolving this matter:

made this statement for the purpose of obtaining unemployment insurance benefits, knowing that the
penalties for false statements or withholding of facts.

I AM WITHOLDING INFORMATION ABOUT THE CAUSE OF MY DISTRESS

SIGNATURE [redacted] DATE 6-27

Interviewer Statement

'ORK HISTORY: Start with your most recent work; include every job for the last two years, including self-employment, contract work, military and part-time.

Company/Employer Name	Original Hire Date (Mo., Day, Yr.)	Last Day Worked (Mo., Day, Yr.)
AMALGAMATED SUGAR	10-10-85	5-27-95
Complete Mailing Address	**Rate of Pay (Mo., Wk., Hr.)**	**Total Gross Earnings**
BOX 127	11.01	$ 24,000
City / State / Zip Code	**Address Where Work Performed**	**Job Title**
TWIN FALLS ID. 83301	T.F.	BULK LOADER
Reason For Leaving		
FIRED DO TO BEING LATE		

Company/Employer Name	Original Hire Date (Mo., Day, Yr.)	Last Day Worked (Mo., Day, Yr.)
Complete Mailing Address	**Rate of Pay (Mo., Wk., Hr.)**	**Total Gross Earnings**
		$
City / State / Zip Code	**Address Where Work Performed**	**Job Title**
Reason For Leaving		

Company/Employer Name	Original Hire Date (Mo., Day, Yr.)	Last Day Worked (Mo., Day, Yr.)
Complete Mailing Address	**Rate of Pay (Mo., Wk., Hr.)**	**Total Gross Earnings**
		$
City / State / Zip Code	**Address Where Work Performed**	**Job Title**
Reason For Leaving		

Company/Employer Name	Original Hire Date (Mo., Day, Yr.)	Last Day Worked (Mo., Day, Yr.)
Complete Mailing Address	**Rate of Pay (Mo., Wk., Hr.)**	**Total Gross Earnings**
		$
City / State / Zip Code	**Address Where Work Performed**	**Job Title**
Reason For Leaving		

Company/Employer Name	Original Hire Date (Mo., Day, Yr.)	Last Day Worked (Mo., Day, Yr.)
Complete Mailing Address	**Rate of Pay (Mo., Wk., Hr.)**	**Total Gross Earnings**
		$
City / State / Zip Code	**Address Where Work Performed**	**Job Title**

Tab 9

AGREEMENT

between

The Amalgamated Sugar Company

and

The American Federation of Grain Millers Local Unions Nos. 282, 283, 284 & 290

Affiliated with the AFL-CIO

TERM AUGUST 1, 1993 TO JULY 31, 1996

(a) *quit, retires, or*
(b) is discharged for just cause, or
(c) fails to report within the reasonable time specified in the notice for Campaign employment, which notice will be sent to the last address he has furnished to the Company.

13.3 *SENIORITY LISTS:* The Company will provide two seniority lists at each factory on February 1, April 1, June 1, and September 1 of any year. In addition, the Company will provide seniority lists at other reasonable periods providing notification is given the Factory Accounting Manager on a timely basis before the end of a payroll period. One seniority list would be for Regular Employees and one would be for Non-Regular Employees. The Regular Employee list will be based on the number of hours of continuous service. The Non-Regular seniority list will be based on the number of months of Campaign worked. These lists will be posted for thirty (30) days for corrections and, if no objections are made, will be accepted as authentic lists. The appropriate Union officer shall be furnished a copy of both lists.

ARTICLE 14
DISCIPLINE AND DISCHARGE

14.1 The Company has the right to discipline or discharge employees for just cause. Discharge shall be evidenced in writing which shall state the reason for the discharge and shall be given to the employee at the time of his discharge. An employee who believes his

discipline or discharge is not justified shall have recourse to the grievance procedure under the Agreement.

14.2 Written warnings are not required nor forbidden by this Article. A copy of all written warnings (Incident Report Form) and discharge notices will be given to the Union. The Union will acknowledge receipt of such copy by initialing the Company copy of the notices. Employee's signature does not constitute personal admission of guilt, but acknowledges receipt of document.

ARTICLE 15
EMPLOYEE REPRESENTATION

15.1 *STEWARDS:* The Local Unions may designate at least three (3) of their members to act as Stewards. Such Stewards shall not assume any of the duties or powers of a supervisor. They shall be empowered by the Union to aid in adjusting grievances between employees and the Company. All grievances involving employees shall be adjusted whenever possible between the immediate supervisor or the foreman under them, and the Employee Steward. In case they are unsuccessful in their efforts to adjust grievances with these officials, the grievance shall be submitted to the Employee's Committee hereinafter provided for.

15.2 *EMPLOYEES' COMMITTEE:* The Local Unions agree to designate from their membership a workmen's committee of three (3) employees whose name shall be posted on the Bulletin Board.

15.3 *GRIEVANCE PROCEDURE:*
Step 1. An employee claiming a grievance shall put his grievance in writing to his Steward within five (5) scheduled working days of the Employee's knowledge of the occurrence to be grieved. The Steward shall attempt to settle the grievance through discussions with the Grievant and his immediate supervisor. Within two (2) scheduled work days after receipt of the grievance, the Steward shall notify the Employee's Committee that he has not succeeded in a settlement of the grievance.

Step 2. If the Steward has failed to settle the grievance with the immediate supervisor in Step 1, the Employee's Committee within three (3) scheduled working days after receiving the grievance from the Steward, shall pass upon the grievance. In the event the Employee's Committee decides the grievance is entitled to further consideration, they shall within two (2) scheduled work days submit the written grievance to the Local Management. The grievance shall briefly state the nature of the grievance, violation alleged and settlement request. The Second Step hearing will be held within five (5) scheduled work days of the receipt of the written grievance from the Employee's Committee. The Company shall give the Union a written decision within five (5) scheduled work days of the Step 2 hearing. Discharge grievances will start in Step 2 and must be submitted directly to the Employee's Committee within five (5) scheduled work days from the time the employee receives the written notice of discharge.

Step 3. In the event the grievance is not settled in Step 2, either party, if they so desire, may within five (5) scheduled work days after the

receipt of the second step answer, refer the grievance to the International Representative and/or the appropriate Company Official for further handling. If a satisfactory agreement cannot be reached between the International Representative and appropriate Company Official with thirty (30) days, it will then be referred to the local Union before proceeding into the arbitration procedure. Time is of the essence and all grievances must be handled within the prescribed time limits set forth herein. Failure to do so shall constitute forfeitures of the written grievance by either party failing to do so. Time limits may be extended by mutual agreement between the parties.

15.4 *ARBITRATION PROCEDURE:* If a grievance is to be carried to arbitration, either the Company or the Union shall notify the other party of its intention by Certified Mail within two (2) weeks after the parties have determined that a satisfactory settlement cannot be reached.
If the Company and the Union are unable promptly to agree upon an impartial arbitrator, the parties will request a list of arbitrators from the Federal Mediation and Conciliation Service. The impartial arbitrator shall be designated in accordance with the procedures of the Federal Mediation and Conciliation Service.
The Arbitrator shall have authority to act only with respect to grievances relating to the interpretation or application of the provisions of this Agreement and his decision shall be final and binding on all parties involved.
Each party shall pay its own expenses incurred in arbitration. The fees and expenses of the Arbitrator shall be borne equally by the Company and the Union.

15.5 *EMPLOYEE REPRESENTATION:* A Union representative may be present at meetings involving disciplinary action by the Company if requested by the Employee.

ARTICLE 16
STRIKES AND LOCKOUTS

16.1 It is mutually agreed that during the life of this Agreement if both parties to same abide by the terms of this Agreement there shall be no cessation of work of the employees or action in any form taken or permitted by them impairing Employer's operation or affecting the distributions of his product, nor shall there by any lockout by Employer.

ARTICLE 17
SEVERANCE PAY

17.1 *SEVERANCE PAY GRANTED:* In the event the operation of the sugar producing facilities of any of the plants covered by this Agreement is to be permanently discontinued by the Company, all Regular Employees, at the affected factory, with three or more years of continuous service shall be granted severance pay, unless the Company or its successors offers the Employee employment either at the same or other location at a similar or reasonable rate of pay. The Employee will have the option of accepting the transfer to another factory or accepting severance pay.

17.2 *BENEFITS ALLOWED:* An eligible employee who has completed three (3) full years

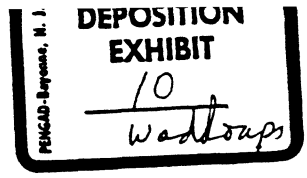
of continuous service shall receive severance pay of one (1) week's pay (40 hours) based upon the regular straight time base wage rate received by the Employee at the close of the last Campaign prior to the discontinuance of that factory operation. For each additional year of continuous service, an eligible employee will receive one (1) week's pay, on the same basis as indicated above, up to a maximum of thirteen (13) weeks severance pay. It is understood that upon receipt of severance pay, and employee relinquishes all recall, seniority, and employment rights with the Company.

ARTICLE 18
MISCELLANEOUS

18.1 *BULLETIN BOARDS:* The Company shall furnish employees suitable places for the posting of notices and bulletins pertaining to employee and Company affairs. Notices posted on the Union Bulletin Boards by the Union must bear the signature of the President or Secretary of the Local Union.

18.2 *UNION AFFAIRS:* It is agreed that no Union activities or Union business of any kind be carried on by Stewards or other Union members during the time they are gainfully employed on shift by the Company. It is further agreed that Stewards or other Union officers may, if they wish, solicit Union members, collect membership dues, contact new employees, or otherwise carry on Union business in the Company locker room prior to and after the close of each shift, providing all parties concerned are off shift. In case of emergency,

Tab 10



c:: Employee
Employee's File
Industrial Relations
Supervisor
Union

THE AMALGAMATED SUGAR COMPANY
INCIDENT REPORT

EMPLOYEE'S NAME Blake Waddoups FACTORY Twin Falls

DATE OF INCIDENT 1986

INCIDENT: EXCESSIVE ABSENTEEISM

Amalgamated considers attendance very important. When someone is absent their workload has to be carried by someone else. This is not fair to your fellow employees or to the Company. Blake your absenteeism has become excessive. If you have developed a health problem it is important that you get it taken care of so you can be a dependable employee.

Listed below is the days you have missed:

January 8, 1986 (8) sick
January 9, 1986 (8) sick
January 12, 1986 (8) sick
January 15, 1986 (4) excused
January 29, 1986 (8) sick
February 3, 1986 (8) sick
September 28, 1986 (8) - called in family emergency
October 6, 1986 (8) sick

DISPOSITION:

Before being granted an excused absence for sick leave a doctor's verification is required. If excessive absenteeism continues you will be discharged.

RECEIPT OF THE FOREGOING IS ACKNOWLEDGE THIS 10TH OF OCT. DAY OF 10-10-86

[signature]

President, Local No. 263

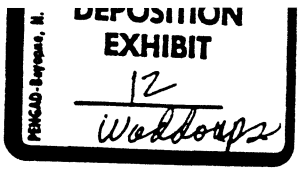
SUPERVISOR [signature]
Signature

10-10.

I have been informed of the above incident. Signature does not constitute personal admission of guilt but acknowledges receipt of document.

Employee [signature]

Tab 12



c: Employee
Employee's File
Industrial Relations
Supervisor
Union

THE AMALGAMATED SUGAR COMPANY
INCIDENT REPORT

EMPLOYEE'S NAME Blake Waddoups FACTORY Twin Falls

DATE OF INCIDENT March 19, 1988

INCIDENT: UNEXCUSED ABSENCE

On Saturday, March 19, 1988, you did not call in. You were called at 11:15 a.m. by the Breck Griffith, Assistant Superintendent. It is your responsibility to call in if you cannot come to work before shift change.

DISPOSITION: March 19, 1988, is an unexcused absence. Another unexcused absence will result in disciplinary action.

RECEIPT OF THE FOREGOING IS ACKNOWLEDGE THIS 23RD DAY OF MARCH 1988

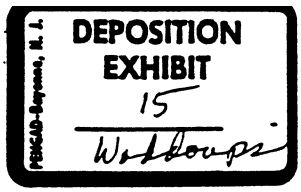
President, Local No. 283

SUPERVISOR Breck A Griffith
Signature

I have been informed of the above incident. Signature does not constitute personal admission of guilt but acknowledges receipt of document.

Employee

Tab 15

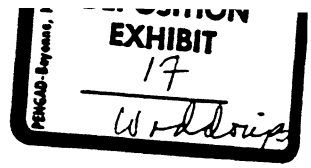


9-28-93 8 PM 2-B SHIFT

I Larry Dayley, Verbally warned Blake Waddoups about his poor attendance on the date.

Larry Dayley
Asst. Supt.

Tab 17



THE AMALGAMATED SUGAR COMPANY

INTER-COMPANY CORRESPONDENCE
TWIN FALLS, IDAHO

December 28, 1993

ATTENTION: Blake Waddoups

SUBJECT: Attendance

In reviewing your sick leave for 1993, I find it necessary to reinstate the requirement for doctor's verification of illness according to the letter you received October 28, 1991. The doctor's verification is to be on the first day of illness and it is your responsibility to make sure either your supervisor or personnel receives the verification. Sick leave will not be granted without verification and an unexcused absences could result.

Larry Dayley
Assistant Superintendent

cc: personnel file
union

NAME Blake Waddoups EMPLOYEE NO. 43911

JANUARY

SUN	MON	TUES	WED	THUR	FRI	SAT
					(1)	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30
31						

FEBRUARY

SUN	MON	TUES	WED	THUR	FRI	SAT
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	(15)	16	17	18	19	20
21	22	23	24	25	26	27
28						

MARCH

SUN	MON	TUES	WED	THUR	FRI	SAT
	1	2	X	X	5	6
7	X	9	10	11	12	13
X	15	16	17	18	19	20
X	22	23	X	25	26	27
28	29	30	31			

APRIL

SUN	MON	TUES	WED	THUR
				1
4	5	6	7	8
11	12	13	14	15
18	19	20	21	22
25	X	27	28	29

MAY

SUN	MON	TUES	WED	THUR	FRI	SAT
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	(28)	29
30	(31)					

JUNE

SUN	MON	TUES	WED	THUR	FRI	SAT
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	X	17	18	19
20	X	22	23	24	25	26
27	28	29	30			

JULY

SUN	MON	TUES	WED	THUR	FRI	SAT
				X	(2)	3
4	(5)	6	X	X	X	10
11	12	13	14	15	16	17
18	19	20	X	22	23	24
25	26	27	28	29	30	31

AUGUST

SUN	MON	TUES	WED	THUR
1	X	3	4	5
8	9	10	11	12
15	16	17	18	19
22	23	24	25	26
X	30	31		

SEPTEMBER

SUN	MON	TUES	WED	THUR	FRI	SAT
			X	X	(3)	4
5	(6)	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
X	27	28	29	30		

OCTOBER

SUN	MON	TUES	WED	THUR	FRI	SAT
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30
31						

NOVEMBER

SUN	MON	TUES	WED	THUR	FRI	SAT
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	(25)	26	27
28	29	30				

DECEMBER

SUN	MON	TUES	WED	THUR
			1	2
5	6	7	8	9
12	13	14	15	16
19	20	X	X	23
26	27	28	29	30

SICK LEAVE (RED)	4-26 (12)	6-16 (8)	6-21 (8)	8-29 (12)	9-6 (6)	9-7 (12)	9-26 (12)	12-21 (8)	12-22 (12)					
VACATION (BLACK)	3-3 (6)	5-8 (6)	5-14 (8)	5-21 (8)	5-28 (8)	7-1 (8)	7-7 (8)	7-8 (8)	7-14 (8)	7-21 (6)	8-13 (8)			
EXCUSED ABSENCE (BLACK)														
INDUSTRIAL ACCIDENT (PURPLE)														
LEAVE OF ABSENCE (BLACK)														
UNEXCUSED ABSENCE (GREEN)														
LATE (BLUE)														
DLO (BROWN)														
NAT'L GAURD (BLACK)														
FUNERAL LEAVE (BLACK)	8-2													

Tab 18

Blake Wadoups
Blake asked for an hour Vacation
This morning 6-29-24 Bob Kinchloe Told
Him No and Blake wouldn't give Bob
any reason. At 3:30 P.M. Blake said He
needed off and Bob told him he needed
To get Vince's approval Blake Threw a fit
and took off without an approval.
This need to be considered an unexcused
absence.

Vince Rosen

Tab 21

CAR NUMBER WDII 401 DATE 2-15-95 FACTORY [illegible] 21 Wheelcups

In-Bound Seal #'s (Top of Car)

1. AGM 876562
2. AGM 876555
3. AGM 876558
4. AGM [illegible]
5. [illegible]
6. AGM 876[illegible]
7.
8.
9.
10.
11.
12.
13.
14.
15.

(Bottom of Car)

AGM 079213
AGM 079215

INITIAL INSPECTION

	Yes	No
A. Amalgamated or customer-assigned car?	☒	☐
B. Inbound seals in place? If missing, how many? Top__ Bottom__	☒	☐
C. Gates/hatches closed? If open, how many? Top__ Bottom__	☒	☐
D. Gate shields in place? If open or damaged, how many?____	☐	☐
E. Air caps in place? If missing, how many?____	☐	☐
F. Mechanical condition satisfactory for use (brakes, ladder, couplers)?	☒	☐

Signature - Locomotive Operator: [illegible]

CAR CLEANING REPORT

Car Cleaned By: [illegible] Date [illegible]

	Yes	No
A. Sanitary condition satisfactory?	☒	☐
B Hatches, gates, sanitary shields clean and free of crusted sugar and working properly?	☒	☐
C. Interior free of trash, soil, insects, paint chips, and abnormal odors?	☒	☐
D. Body cracks absent?	☐	☐
E. Water marks or roof leaks absent?	☐	☐
F. Airslide fabric intact, no holes?	☐	☐
G. Sugar removed? How much? 100 Pounds	☐	☐
H. Car is clean and ready for loading?	☒	☐

Signature - Car Cleaner: [illegible]

CAR LOADING REPORT

Car Loaded By: BLAKE WADDUPS Date 2-16-95

	Yes	No
A Inner gate is in closed position?	☒	☐
B. Hatch rims are clean and free of crusted sugar?	☐	☐
C. Before closing hatches, checked for contamination on top of sugar?	☐	☐
D Hatches and gates are protected with plastic?	☐	☐
E. Three-way valves in closed position?	☐	☐
F. Top of car is clean. Loose sugar and tools removed?	☐	☐
G Sample of sugar provided to Laboratory?	☐	☐
H. Car is ready for final inspection?	☐	☐
I. Was car dehumidified? Relative humidity level in car____%	☒	☐

Car temp after loading____ Grains H_2O/lb____

Signature - Bulk Loader: [illegible]

FINAL INSPECTION AND APPROVAL FOR SHIPMENT

Date: 2-20-95 Time: 4:00 AM Customer: [illegible]

Location: [illegible]

	Yes	No
A. All seals in place, locked, verified	☐	☐
B. Gate shields and hatches protected with plastic?	☐	☐
C. Top of car is clean?	☐	☐
D. Three-way valves closed? Air caps in place?	☐	☐
E. All canvases and bags accounted for?	☐	☐

-MT [illegible]

VT [illegible]

E/PLACE [illegible]

DITION [illegible]

TEMP 29°

Out Bound Seal #'s (Top of Car)

1. AGM 156587
2. 156588
3. 156589
4. 156590
5. 156591
6. 156592
7. 156593
8. [illegible]
9. [illegible]
10. [illegible]
11. 156601
12. 156602
13.
14.
15.

(Bottom of Car)

1. AGM 156593
2. 156594
3.
4.
5.
6.
7.
8.
9.
10.
11.
12.
13.
14.
15.

◆ ◆ ◆ ◆ ◆ ◆ ◆ ◆

QUALITY ASSURANCE

Sugar meets customer specifications?

Yes ☐

No ☐

Chemist initials____

CAR REJECTION RECORD

(Use this side ONLY if car is to be rejected)

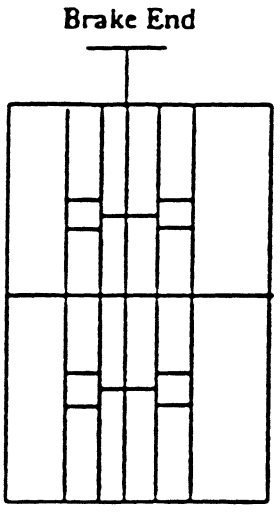
Warehouse _____ Date _____

Car Number _____ Foreman _____

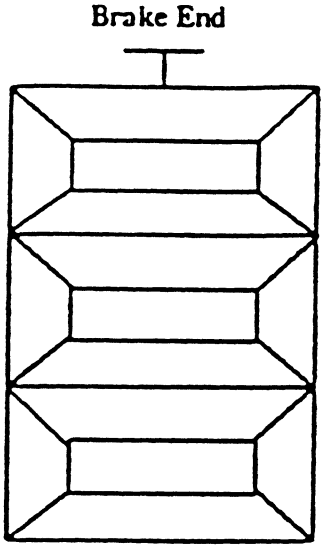
Reason car cannot be loaded: _____

_____

Location of defect (Mark on car type below, looking down from top.):



AIRSLIDE CAR



CENTERFLOW CAR

FOR GENERAL OFFICE USE: Date Received _____

Next Loading Location _____ Date _____

INSTRUCTIONS

REJECTING LOCATION:

When a car is being rejected, complete this side of the report. Send a Xerox copy to Traffic Department - General Office, Ogden.

TRAFFIC DEPARTMENT:

When the car is released from the RR shop send a copy of this report to the location loading the car for the first time.

NEXT LOADING LOCATION:

CAR NUMBER UP 20607 DATE 2-15-95 FACTORY Twin Falls

In-Bound Seal #'s (Top of Car)

1. UP 222282
2. 222283
3. 000801
4. 000796
5. 000802
6. 000795
7. 000803
8. 000797
9. 000800
10. 000798
11.
12.
13.
14.
15.

(Bottom of Car)

1. 222281
2. 222279
3. 222280
4. 222284
5.
6.
7.
8.
9.
10.
11.
12.

LMT 193500

WT 69500

TE/PLACE 2-6-95

NDITION 20°F

R TEMP 75

INITIAL INSPECTION

	Yes	No
A. Amalgamated or customer-assigned car?	☑	☐
B. Inbound seals in place? If missing, how many? Top__ Bottom__	☑	☐
C. Gates/hatches closed? If open, how many? Top__ Bottom__	☑	☐
D. Gate shields in place? If open or damaged, how many?____	☑	☐
E. Air caps in place? If missing, how many? 1	☐	☑
F. Mechanical condition satisfactory for use (brakes, ladder, couplers)?	☑	☐

Signature - Locomotive Operator:_____

CAR CLEANING REPORT

Car Cleaned By: B Smith Date 2-15-95

	Yes	No
A. Sanitary condition satisfactory?	☑	☐
B. Hatches, gates, sanitary shields clean and free of crusted sugar and working properly?	☑	☐
C. Interior free of trash, soil, insects, paint chips, and abnormal odors?	☑	☐
D. Body cracks absent?	☑	☐
E. Water marks or roof leaks absent?	☑	☐
F. Airslide fabric intact, no holes?	☑	☐
G. Sugar removed? How much? 200 Pounds	☑	☐
H. Car is clean and ready for loading?	☑	☐

Signature - Car Cleaner:_____

CAR LOADING REPORT

Car Loaded By: Boyd Date 2-15-95

	Yes	No
A. Inner gate is in closed position?	☑	☐
B. Hatch rims are clean and free of crusted sugar?	☑	☐
C. Before closing hatches, checked for contamination on top of sugar?	☑	☐
D. Hatches and gates are protected with plastic?	☑	☐
E. Three-way valves in closed position?	☑	☐
F. Top of car is clean. Loose sugar and tools removed?	☐	☑
G. Sample of sugar provided to Laboratory?	☑	☐
H. Car is ready for final inspection?	☑	☐
I. Was car dehumidified? Relative humidity level in car 6 %	☑	☐

Car temp after loading 66 Grains H_2O/lb 5

Signature - Bulk Loader: Boyd

FINAL INSPECTION AND APPROVAL FOR SHIPMENT

Date: 2-20-95 Time: 4:00 AM Customer:_____

Location:_____

	Yes	No
A. All seals in place, locked, verified	☑	☐
B. Gate shields and hatches protected with plastic?	☑	☐
C. Top of car is clean?	☐	☑
D. Three-way valves closed? Air caps in place?	☐	☑
E. All canvases and bags accounted for?	☐	☑

Out Bound Seal #'s (Top of Car)

1. 028799
2. 800
3. 1
4. 2
5. 3
6. 4
7. 5
8. 6
9. 7
10. 8
11. Alum 1. 156595
12. Alum 12. 156596
13.
14.
15.

(Bottom of Car)

1. 028809
2. 10
3. 11
4. 12
5.
6.
7.
8.
9.
10.
11.
12.
13.
14.
15.

◆ ◆ ◆ ◆ ◆ ◆ ◆ ◆

QUALITY ASSURANCE

Sugar meets customer specifications?

Yes ☐

No ☐

Chemist initials_____

Date

CAR REJECTION RECORD

(Use this side ONLY if car is to be rejected)

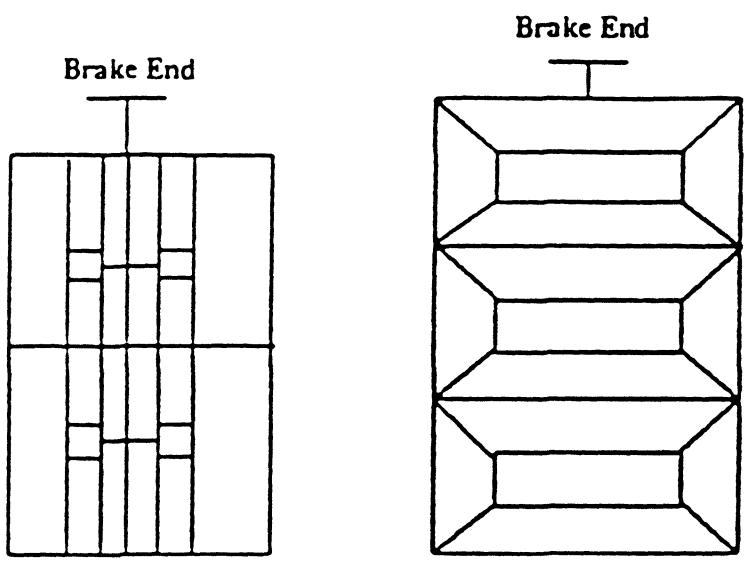
Warehouse _____ Date _____

Car Number _____ Foreman _____

Reason car cannot be loaded: _____

_____

Location of defect (Mark on car type below, looking down from top.):



AIRSLIDE CAR CENTERFLOW CAR

FOR GENERAL OFFICE USE: Date Received _____

Next Loading Location _____ Date _____

INSTRUCTIONS

REJECTING LOCATION:

When a car is being rejected, complete this side of the report. Send a Xerox copy to Traffic Department - General Office, Ogden.

TRAFFIC DEPARTMENT:

When the car is released from the RR shop send a copy of this report to the location loading the car for the first time.

NEXT LOADING LOCATION:

Tab 22

RECEI | the classifications and tariffs in effect on the date of t | ...rs Bill of Lading

ALS AND NUMBER OR PIGGYBACK NO. | MOTOR CARRIER TRAILER NO. | ATTERN NO.

WP 11601 | SUG DIL 1

ORIGIN TWIN FALLS

INTERNATIONAL DIST
P.O. BOX 22106
ST. LOUIS, MO 63116-0106

D TO INTERNATIONAL INGREDIENT CORP
204 PEMBLETON DRIVE
MARSHALL TOWN, IA 50158

UP-FREMONT CNW

SHIP DATE Month	Day	Year	SHIPPING REPORT NO. (Bill of Lading No.)
03	02	95	06-6921

GENERAL OFFICE ORDER NO.	CUSTOMER I.D. NO.
6-1094	04290 0201 7
CUSTOMER CONTRACT NO.	CUSTOMER RELEASE NO.
BROKER NO. AND NAME	BROKER RELEASE NO.
TASCO 99	

RAIL	COMMON CARRIER	TASCO TRUCK	CUSTOMER TRUCK	OTHER	COLLECT Yes	COLLECT No	PREPAID Yes	PREPAID No	FREIGHT
1	2	3	4	5	1	0	1	0	
						0 1			2.28

Subject to Section 7 of conditions of applicable bill of lading, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement: The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges

SIGNATURE OF CONSIGNOR

PACKAGE	LABEL	NO. UNITS	100 LB EQUIVALENT	PRICE	REMARKS	LOT #	QTY PER LOT #
BULK SWEEPINGS	W.S.		1250.00			5T0474K	
FOR ANIMAL FEED ONLY							
THIS SUGAR DOES NOT MEET FDA REQUIREMENTS FOR HUMAN MPTION AND IS SOLD WITH THE UNDERSTANDING IT WILL NOT ED FOR HUMAN CONSUMPTION.							
TOTAL CWT			1250.00				

DEPOSITION EXHIBIT 22 Waldrop

AGM 156597 thru 156602

Subject to verification by the WESTERN WEIGHING & INSP. BUREAU

DISCOUNT TERMS			ALLOWANCES CODE	ALLOWANCES AMOUNT	REMARKS	NO OF PALLETS IN	NO OF PALLETS OUT
HANDLING CODE	PRINT CODE	DECLINE FLAG					

INSTRUCTIONS

SHIPPING WEIGHT 1250.00

DATE ORDER RECEIVED

THE AMALGAMATED SUGAR COMPANY

Post Office Shipper MARK OLSEN P.O. BOX 127 TWIN FALLS ID 83303

WE HAVE RECEIVED THE ABOVE SUGAR

AGENT

PER

AS000661

SHIP DATE 02-Mar | ARR DATE | PICKUP DATE

Date 01-Mar-95 02:09 Ph

Sold To: INTERNATIONAL DIST.
P.O. BOX 22106
ST. LOUIS
MO 63116-0106

Deliver to: INTERNATIONAL INGREDIENT CORP.
204 PEMBLETON DRIVE
MARSHALL TOWN
IA 50158

Cust ID # 04290-0201-7
Contract #
Release #
Broker TASCO
Broker ID # 99
Broker Rel #
Car/Trl #
Move Date
Weight 6.692

Routing:
Pattern:
Rate:

PRODUCT:				
	04	1250 UNITS	BULK FINE GRAN	1250 CWT

FOR ANIMAL FEED ONLY

TOTAL: 1250 CWT

LOADING INST.: SMALL AIRSLIDE/1250
BILL TO WP 11601- ANIMAL FEED ONLY!

1250 00

BULK CAR LOADING CHART

DATE LOADED 2-16-95
LOT 5T047
SILO NUMBER 4K
CAR INITIAL & NO. WP 11601
STENCILED LIGHT WT 57400
DATE & PLACE CAR LAST LIGHT WEIGHED P.O 2-84
LOAD LIMIT 162600
SEAL NUMBERS Void AGM 156587 THRU AGM156599 & ADD 156597 THRU 156603

INSPECTION PROCEDURE

	NAME	DATE	TIME
CLEANED	B SHIFT	2-15-95	
PRE-LOAD	BLAKE HADDOUPS	2-16-95	7:00 AM.
INSPECTION			
FINAL INSPECTION AND SEALED			

TIME TAKEN TO CLEAN EMPTY CAR 1.3 HR.
NORTH _____ SOUTH ✓

BULK CAR LOADER BLAKE HADDOUPS

WAREHOUSE FOREMAN DM

110796
110797
110798

AS000662

Tab 23

SHIFT BEGINS 3-3-95
BLAKE WADDOUPS WASN'T HEARD NOR DID HE CALL IN UNTIL 11:10 AT WHICH TIME HE TOLD ME HE HAD HAD BACK SPASMS & TAKEN SOME HIGH POWERED PILLS & DIDN'T WAKE UP. I ASKED HIM WHY HIS WIFE DIDN'T WAKE HIM UP & HE SAID SHE HAD A FIT WITH HIM & STAYED OVER HER PARENTS. I ASKED HIM IF HE WENT TO THE DR & HE SAID NO. I ASKED HIM IF HE WAS COMING IN & HE DIDN'T THINK SO. HE SAID HE NEEDED TO GET HIS CHECK & PAY SOME BILLS. I INFORMED HIM THAT WE NEEDED TO BE INFORMED OF ILLNESS AND THAT I CONSIDERED IN UNEXCUSED. HE SAID OK.

5-8-95
Verbal - Called to Cry Baker about temperpattitude & moodiness.

5-11-95
Talked to Blake about tardies, attitude, getting along with others. Again warned him about 2 unexcused

1-8-95
Sg Warehouse Switchman & Engineer operating locomotive (CLERK HARRELL & WM DEE) Disciplinary P. 1-6-95 BERT CALLED IN SICK & HE WAS ACTUALLY BEST MAN AT A WEDDING (UNEXCUSED). Wm. DEE HAS BEEN LATE 3 TIMES (OUTSIDE OF PAY) & BOTH HAVE BEEN HURT. I VERBALLY WARNED THEM ABOUT THE PROBLEMS I HAVE HAD WITH THEM & TOLD THEM THAT ANY-MORE WOULD RESULT IN ME TAKING THEM OFF THERE.

1-14-95 - Vic thought he seen Blake Waddoups sleeping in office. Odie told me on the 1-15-95

2-24-95
TALK TO GREG WARD ABOUT GETTING ALONG WITH FELLOWS & NOT ARGUING.

2-26-95 - Warned Stan Whitmer about playing card game on Computer

Tab 26

Date [illegible] Shift _____ Time [illegible] AM / PM

Name [illegible]

Supervisor [illegible] Recorded by [illegible]

Sick ✓ (NATURE OF ILLNESS) Late _____ (HOW LATE AND REASON)

Injury on Job _____ (NATURE OF INJURY) Off Job _____ (NATURE OF INJURY)

Other _____ (GIVE REASON)

★ ★

Date 5-28-95 Shift _____ Time _____ AM / PM

Name Jim Flora

Supervisor Dayley Recorded by [illegible]

Sick _____ (NATURE OF ILLNESS) Late ✓ (HOW LATE AND REASON)

Injury on Job _____ (NATURE OF INJURY) Off Job _____ (NATURE OF INJURY)

Other _____ (GIVE REASON)

★ ★

Date 5-28-95 Shift _____ Time 10:00 AM / PM

Name BLAKE WADDOUPS

Supervisor SCHWARTZ Recorded by [illegible]

Sick _____ (NATURE OF ILLNESS) Late _____ (HOW LATE AND REASON)

Injury on Job _____ (NATURE OF INJURY) Off Job _____ (NATURE OF INJURY)

Other _____ (GIVE REASON)

★ ★

DEPOSITION EXHIBIT 26 Waddoups

AS000071

Tab C

W. MARK GAVRE (4577)
MARGARET NIVER MCGANN (7951)
PARSONS BEHLE & LATIMER
Attorneys for Defendant
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P. O. Box 45898
Salt Lake City, Utah 84145-0898
Telephone: (801) 532-1234

IN THE SECOND JUDICIAL DISTRICT COURT

IN AND FOR WEBER COUNTY, STATE OF UTAH

* * * * * * *

BLAKE WILLIAM WADDOUPS and JAMES EDWARD SPARROW, JR., Plaintiffs, vs. THE AMALGAMATED SUGAR COMPANY, a Utah corporation, et al., Defendant.	Case No. 950900441 Judge Stanton M. Taylor **MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

* * * * * * *

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I. INTRODUCTION

Plaintiffs are former union-represented employees of The Amalgamated Sugar Company ("Amalgamated Sugar" or "the Company") who worked in Twin Falls, Idaho. On May 22 and 28, 1995, plaintiffs were separately discharged by the Company for excessive absenteeism. Specifically, they each had more than three unexcused absences, the maximum allowed by Company policy. Plaintiffs did not contest their discharges as they were entitled to do under the collective bargaining agreement between their union and the Company.

Now, plaintiffs claim that they were potential "whistleblowers," who were discharged for threatening to publicize the Company's alleged criminal shipping of contaminated sugar. On this basis, they claim that they were wrongfully discharged in violation of Utah public policy. Plaintiffs also assert claims for tortious infliction of emotional distress, interference with prospective economic relations, and conspiracy. There is no factual basis or legal merit to any of plaintiffs' claims.

Plaintiffs' claims are governed by Idaho law because all the events — plaintiffs' employment, their discharges, and the alleged shipment of contaminated sugar — took place in Twin Falls, Idaho. Nothing at issue in this case happened in Utah. Accordingly, plaintiffs' "violation of Utah public policy" claim fails because Utah law has no application to the instant case. The claim would also fail if it were governed by Utah law because plaintiffs did not report the alleged shipment of contaminated sugar (which is a federal crime) to outside authorities. Under Utah law, a "public policy wrongful discharge" claim based on whistleblowing of alleged criminal

conduct requires that the employee have reported the alleged conduct to outside authorities, which plaintiffs did not do.

Plaintiffs' emotional distress claim should be dismissed because (a) it is barred by the exclusive remedy provision of the Idaho workers' compensation statute, (b) it is preempted by federal labor law, and (c) it lacks elements essential under Idaho law. Plaintiffs' interference with prospective economic relations claim fails because there is no identified business relationship with which Amalgamated Sugar could interfere. Plaintiffs' conspiracy claim fails because only one person, Amalgamated Sugar, is accused of wrongdoing and it cannot conspire with itself.

II. STATEMENT OF FACTS

Plaintiffs' Employment

1. Amalgamated Sugar hired Blake Waddoups ("Waddoups") in 1985 and James Sparrow ("Sparrow") in 1989 to work at the Company's sugar manufacturing facility in Twin Falls, Idaho. Complaint ¶¶ 8, 10.

2. "Plaintiffs, Mr. Waddoups and Mr. Sparrow, at all times material hereto worked and resided in the County of Twin Falls, State of Idaho." Complaint ¶ 7.

3. Plaintiffs' employment with Amalgamated Sugar was governed by a collective bargaining agreement between The American Federation of Grain Millers Union ("the Union") and the Company, and both plaintiffs were members of the Union. Deposition of James E. Sparrow, Jr. at 28-29 (hereinafter "Sparrow Depo. at __"); Deposition of Blake William Waddoups at 95-96 (hereinafter "Waddoups Depo. at __").

4. Under the collective bargaining agreement, employees may be discharged only for "just cause," and a discharged employee may file a grievance if he believes that his discharge was not justified. The grievance process culminates in binding arbitration. Ex. 4, at pp. 4-5, to Sparrow Depo.; Ex. 9, at pp. 4-5, to Waddoups Depo.

5. Plaintiffs' employment was subject to the rule that "The maximum number of unexcused absences you can receive before being terminated is three (3)." Ex. 3 to Sparrow Depo. Plaintiffs were familiar with this rule. Sparrow testified:

> Q. Do you recall being informed of the rule that you could have no more than three unexcused absences?
> A. Yes.
> Q. When do you recall being informed of that rule?
> A. All the time.
>
> ***
>
> A. [P]eople were always talking about it, you know, foremen, supervisors. (Sparrow Depo. at 27-28.)

Sparrow's Unexcused Absences

6. Sparrow had unexcused absences on September 10, 1994 and March 24, 1995. Sparrow Depo. at 201-03 and Ex. 7, at pp. 1-2, thereto.

7. On May 20, 1995, Sparrow did not report to work, but called in sick. Sparrow explained:

> A. I just -- it was just nerves in my stomach. I just felt really queasy and I just didn't feel like going to work mostly. It was just the place had gotten to me and I just didn't feel like being there.
> Q. So you called in sick?
> A. Yes. (Sparrow Depo. at 210.)

8. On the afternoon of the same day, Sparrow drove to Nevada and was caught speeding. Because he had an outstanding warrant for a prior unpaid speeding ticket, Sparrow was arrested and not released from jail until May 25, 1995. Sparrow missed four days of work, May 20, 21, 23, and 24, 1995. Sparrow Depo. at 211-16.

9. Sparrow knew that his absences were unexcused and that he had exceeded the maximum number permitted. When he returned to Twin Falls, Sparrow telephoned his foreman and asked him if he was fired:

> Q. Why did you ask him if you were fired?
> A. Because I spent three days in jail and I should have worked. I work Friday. I missed three days of work. That's unexcused. Plus I knew I had one before and that's four, and I knew I could be terminated for that.
> Q. You knew you could be terminated for unexcused absences and you had enough to be terminated?
> A. Yeah.
>
> ***
>
> Q. Was there any question in your mind that being absent from work because you're in jail is an unexcused absence?
> A. I have always believed before that it was.
> Q. [You] always believed that it was an unexcused absence?
> A. Yes.
> Q. So by the time you got back to work on the 25th and your shift was finished you had four unexcused absences; is that correct?
> A. Correct. (Sparrow Depo. at 217, 222.)

10. Sparrow was discharged on May 22, 1995 by Assistant Superintendent Bill Stuart for having more than three unexcused absences. Sparrow Depo. at 219.

11. Sparrow did not file a grievance with the Union as permitted under the collective bargaining agreement. Sparrow Depo. at 31, 43-44.

Waddoups' Unexcused Absences

12. On October 10, 1986, Waddoups received a written warning for excessive absenteeism because of the large number of sick leave days he had taken. He was told that he would need medical verification for any future sick leave absences. He was also warned: "If excessive absenteeism continues you will be discharged." Ex. 10 to Waddoups Depo.

13. Waddoups had an unexcused absence on March 19, 1988. Waddoups Depo. at 113 and Ex. 12 thereto.

14. On September 28, 1993, Waddoups was verbally warned about his poor attendance. Waddoups Depo. at 118-19 and Ex. 15 thereto.

15. On December 28, 1993, Waddoups received another written warning about his attendance, and he was again required to have medical verification for sick leave absences. Ex. 17 to Waddoups Depo.

16. On June 29, 1994, Waddoups had an unexcused absence. Waddoups Depo. at 123 and Ex. 18 thereto.

17. On March 3, 1995, Waddoups had an unexcused absence. Waddoups Depo. at 243 and Ex. 23 thereto.

18. On May 28, 1995, Waddoups did not report to work. At 10:00 a.m., four hours after his work shift had begun, Waddoups called in saying he was sick. Waddoups then

spoke to Assistant Superintendent Larry Dayley, and gave him a different explanation: "I told him that I had personal problems. I didn't know why the alarm didn't go off, but I had over slept. I had called in sick because I wasn't feeling well." Waddoups Depo. at 258, 260-61 and Ex. 26 thereto.

19. Assistant Superintendent Larry Dayley terminated Waddoups for excessive absenteeism. Waddoups Depo. at 22-23 and Ex. 2, at p.1, thereto.

20. In his application for unemployment benefits, Waddoups admitted that he had been warned "2-3 times" that his absence rate of reaching unacceptable levels. Waddoups Depo. at 31 and Ex. 2, at p. 2, thereto.

21. Waddoups did not file a grievance with the Union over his discharge. Waddoups Depo. at 107.

Plaintiffs' Whistleblowing Allegation

22. On February 16, 1995, there was a fatal accident at the Amalgamated Sugar Twin Falls, Idaho facility. The facility was shut down and cleaned for three days after the accident. Sugar that was being loaded on the day of the accident was subsequently shipped to an animal feed manufacturer. Complaint ¶¶ 15, 22; Sparrow Depo. at 64, 126-27.

23. Plaintiffs claim that sugar stored at the Twin Falls facility was contaminated by the fatal accident, and was subsequently shipped to customers for human consumption, a criminal violation of the federal Food, Drug and Cosmetics Act. Complaint ¶ 44; Sparrow Depo. at 46-7.

24. Plaintiffs claim that they "threaten[ed] to expose the [Company's] illegal activity" of shipping supposedly contaminated sugar. Complaint ¶ 40. However, neither plaintiff ever contacted the Food and Drug Administration, any public authority or the media about the Company supposedly shipping contaminated sugar. Sparrow Depo. at 173-74; Waddoups Depo. at 65; Complaint ¶¶ 23-44.

SUMMARY JUDGMENT STANDARD

Rule 56(c) of the Utah Rules of Civil Procedure mandates the entry of summary judgment when the moving party makes a showing which precludes, as a matter of law, the awarding of any relief to the other party. FMA Acceptance Co. v. Leatherby Ins. Co., 594 P.2d 1332 (Utah 1979). If plaintiffs cannot prove an essential element of a claim, there can be no genuine issue as to any material fact, and summary judgment is appropriate. For the reasons described below, defendant is entitled to judgment as a matter of law because plaintiffs cannot make a sufficient showing on essential elements of their claims.

ARGUMENT

III. PLAINTIFFS' CLAIMS ARE CONTROLLED BY IDAHO LAW.

Because Utah is the forum state, Utah's choice of law rules determine which law applies in the instant case[1]. Records v. Briggs, 887 P.2d 864 (Utah App. 1994). Utah has adopted the most "significant relationship" standard, as set forth in the *Restatement (Second) of Conflict*

[1] Because Idaho and Utah law differ on several issues in the instant case, including workers compensation preemption and tortious infliction of emotional distress, it is necessary for the Court to resolve the choice of law question.

of Laws § 145, for determining choice of law questions. Forsman v. Forsman, 779 P.2d 218, 219-20 (Utah 1989); Records v. Briggs, 887 P.2d at 867; Doe v. Nevada Crossing, Inc., 920 F. Supp. 164, 166 (D. Utah 1996).

To determine whether the law of Idaho or Utah applies, the following factors should be considered: (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (4) the place where the relationship, if any, between the parties is centered. Forsman, 779 P.2d at 219 (citing to Restatement (Second) of Conflict of Laws § 145).

In the instant case, it is undisputed that plaintiffs were hired in Idaho, worked in Idaho, engaged in the conduct for which they were allegedly wrongfully treated in Idaho, were terminated in Idaho, suffered their injuries in Idaho, and resided in Idaho. The only connection Utah has to the dispute is the fact that Amalgamated Sugar is a Utah corporation, headquartered in Utah. Even this connection is weak because all of the Company's alleged acts took place in Idaho, not in Utah. When, as here, an employee lives, works and is terminated in one state and brings claims against his employer because of his discharge, the place of the employer's incorporation or headquarters is not significant. The governing law is the law of the state in which the discharge occurs. See Pacheco v. Hercules, 61 FEP Cases (BNA) 825, 826-27 (D.Utah 1993) (under Utah's choice of law rules, Georgia law governs wrongful discharge claims (tort and contract) where plaintiff was discharged in Georgia, worked and lived in Georgia

at time of his discharge, and employer had a place of business in Georgia, despite fact that plaintiff was hired and worked in Utah for many years).[2]

In sum, the alleged injuries and wrongful acts occurred in Idaho, the plaintiffs worked and lived in Idaho, the defendant does business in Idaho, and the relationship at issue (employment) was centered in Idaho. Accordingly, under Utah's choice of law rules, Idaho law should govern plaintiffs' claims.

IV. PLAINTIFFS' CLAIM THAT THEIR DISCHARGES VIOLATED UTAH PUBLIC POLICY LAW FAILS BECAUSE IDAHO LAW GOVERNS THE INSTANT CASE.

In their First Cause of Action, plaintiffs allege that their terminations violated the common law of Utah, and specifically that they were wrongfully discharged "in violation of vital, overarching fundamental, permanent, clear, and substantial public policies of the State of Utah." Complaint ¶ 39 (emphasis added). This claim, based on Utah law, is without legal basis because Idaho law governs plaintiffs' claims. For this reason, plaintiffs' First Cause of Action should be dismissed.

V. PLAINTIFFS' PUBLIC POLICY CLAIM WOULD FAIL EVEN IF IT WERE GOVERNED BY UTAH LAW.

Under Utah law, only public policies that are "clear and substantial" can give rise to a civil cause of action. Consequently, "not every employment termination that has the effect of

---

[2] See also Caton v. Leach Corp, 896 F.2d 939, 942-43 (5th Cir. 1990) (under significant relationship analysis, Texas law applies to claims arising out of employee's discharge when employee worked, lived, and was terminated in Texas, despite the fact the employer was incorporated and headquartered elsewhere); A.M. Capen's Co. v. American Trad. & Prod. Corp., 74 F.3d 317, 321 (1st Cir. 1996) (Puerto Rico law governs tort and contract claims arising out of termination of distributorship where termination occurred in Puerto Rico, despite fact that the

violating some public policy is actionable." Fox v. MCI Communications Corp., 931 P.2d 857, 860 (Utah 1997). Where criminal conduct is alleged, it is the "enforcement" of the "criminal code" that "constitutes a clear and substantial public policy." Hence, an employee may have "a cause of action for wrongful termination based on termination of the employee for reporting criminal activity to public authorities." Id. At 861. Consequently, even if an employee is retaliatorily discharged, there is no actionable public policy violation if the employee reports the criminal conduct only to the employer:

> However, if an employee reports a criminal violation to an employer, rather than to public authorities, and is fired for making such reports, that does not, in our view, contravene a clear and substantial public policy.

Id. (holding that no public policy wrongful discharge claim stated where employee complained only to employer about alleged criminal activity).

Because plaintiffs allege that Amalgamated Sugar engaged in criminal conduct (shipping contaminated sugar in violation of the Food Drug and Cosmetics Act) but did not report this alleged crime to the FDA or any other public authority, plaintiffs fail to state a public policy claim under Utah law.

---

company was incorporated and headquartered elsewhere and did not have any offices or facilities in Puerto Rico).

VI. PLAINTIFFS' EMOTIONAL DISTRESS CLAIM SHOULD BE DISMISSED ON MULTIPLE GROUNDS.

A. Plaintiffs' Claims For Negligent And Intentional Infliction Of Emotional Distress Are Barred By Idaho's Workers' Compensation Statute.

Plaintiffs' cause of action for negligent and intentional infliction of emotional distress alleges that Amalgamated Sugar engaged in workplace conduct that caused plaintiffs emotional and physical injury. Complaint at ¶¶ 47-50. In Idaho (as in Utah), the workers compensation statute provides the exclusive remedy to employees for injuries arising out of employment:

> [T]he liability of the employer under this [Workmen's Compensation] law shall be exclusive and in place of all other liability of the employer to the employee, his spouse, dependents, heirs, legal representations or assigns.

Idaho Code § 72-209(1). See also Kearney v. Denker, 760 P.2d 1171, 1173 (Idaho 1988) ("Our worker's compensation law is a legislatively prescribed exclusive system of compensation for employees who are injured on the job." Affirming summary dismissal of tort claims against employer for events allegedly occurring at the workplace).

The Idaho Workmen's Compensation Act contains an exception to its exclusive remedy provision which applies "where the injury . . . is proximately caused by the willful or unprovoked physical aggression of the employer, its officers, servants or employees." Idaho Code § 72-209(3).[3] If any such "physical aggression" does occur in the workplace, it "shall not be

---

[3] The Idaho Workmen's Compensation Act necessarily bars a negligence claim for the obvious reason that negligent conduct does not meet the requirements of "willful or unprovoked of physical aggression." Kearney, 760 P.2d at 1173. Plaintiffs' claim of negligent infliction of emotional distress fails for the additional reason that, under Idaho law, "For a claim of negligent infliction of emotional distress to arise, there must be physical injury to the plaintiff." Walston v. Monumental Life Ins. Co., 923 P.2d 456, 464 (Idaho 1996). In the instant case, there is no claim or evidence of any physical injury to plaintiffs. Complaint ¶¶ 47-48.

imputable to the employer unless provoked or authorized by the employer, or the employer was a party thereto." Id.

In the instant case, Waddoups does not allege that he was injured by any "physical aggression." Complaint ¶47. Accordingly, Waddoups' emotional distress claim does not come within the statutory "physical aggression" provision, and is therefore barred by the exclusive remedy provision of the Idaho Workmen's Compensation Act.

Sparrow alleges that on one occasion a supervisor "slapped [him] up the side of the head with [a] yellow notebook." Sparrow Depo. at 98. Sparrow does not claim that he was injured or suffered emotional distress as a result of this incident. Rather, it passed quickly with a few words between him and the supervisor. Id. at 98-99. Sparrow also testified that he has been in "good health" since leaving Amalgamated Sugar, except for being "bummed out" as a result of being fired. Nor has Sparrow seen a doctor, psychologist, psychiatrist, or therapist. Id. at 268-70.

In sum, even if a slap with a "yellow notebook" constitutes "physical aggression," there is no evidence that Amalgamated Sugar provoked, authorized or was a party to the incident or that Sparrow was injured, physically or emotionally, by the incident. Accordingly, Sparrow's emotional distress claim is also barred by the Idaho Workmen's Compensation Act.

B. Federal Labor Law Preempts Plaintiffs' Emotional Distress Claims.

The federal Labor Management Relations Act ("LMRA") exclusively governs collectively bargaining agreements, and preempts all state-law claims that relate to collective

bargaining agreements. 29 U.S.C. § 185(a). The purpose of this "expansive" preemption of state law is to ensure that uniform federal law governs the negotiation, interpretation and administration of collective bargaining agreements. Retherford v. AT&T Communications, 844 P.2d 949, 968 (Utah 1992) (citing U.S. Supreme Court decisions). The LMRA preempts tort as well as contract claims in order to uphold the federally-created system of collective bargaining.

> The justification for this expansive view of [federal labor law] preemption is the ease with which an aggrieved employee otherwise could turn a suit for breach of a collective bargaining agreement into a state tort or contract claim, thereby obtaining a state law holding that might result in an inconsistent interpretation of the collective bargaining agreement. (Id. at 968-69.)

In the context of a unionized workplace, the LMRA preempts claims for tortious infliction of emotional distress, except where the conduct at issue "is purely personal and does not implicate the exercise of supervisory authority." Id. at 971. Whenever the conduct at issue is not purely personal, but involves exercise of management authority, any tort claim regarding such conduct is barred by federal law. This is true even if the conduct constitutes an abuse of authority and is done "to torment the plaintiff." Id. This is so because such conduct, even if abusive and improper, implicates the collective bargaining agreement and the authority it grants to the employer. Id. at 971-72.

In the instant case, plaintiffs allege that the Company failed to provide Waddoups with adequate medical and psychological counseling after the fatal accident, implied that he was responsible for the accident, and threatened Sparrow with discharge. Complaint ¶¶ 47-48. These alleged acts were not purely personal, but alleged abuses of company or supervisory authority.

Id. Indeed, plaintiffs allege that the acts were within the scope and course of employment. Id. ¶ 3. Because the conduct alleged by plaintiffs is not "purely personal" and does "implicate the exercise of supervisory authority," plaintiffs' emotional distress claims are barred by federal labor law. Retherford, 844 P.2d at 971-72 (affirming summary dismissal of intentional infliction of emotional distress claim based on alleged supervisory misconduct).

C. Essential Elements of Plaintiffs' Emotional Distress Claims Are Without Support.

The tort of intentional infliction of emotional distress requires the defendant to have engaged in "very extreme" and "outrageous" conduct that "no reasonable person could be expected to endure." Hatfield v. Max Rouse & Sons Northwest, 606 P.2d 944, 954 (Idaho 1980); Davis v. Gage, 682 P.2d 1282, 1288 (Idaho App. 1984). The conduct alleged here — failing to provide Waddoups with adequate medical and psychological counseling, implying that Waddoups was responsible for the fatal accident since he was in charge of the machinery involved, and threatening to discharge Sparrow — does not constitute actionable "outrageous" conduct. Certainly, the only action that might even in theory escape the exclusive remedy provision of the Idaho workers' compensation statute — the slap with a yellow notebook — was not extreme and outrageous conduct.

It is also an essential element of the tort that plaintiffs have suffered "severe" and "disabling" emotional distress. This requires more than ordinary distress, anguish or depression:

> [E]vidence showing that the plaintiff was upset, embarrassed, angered, bothered and depressed did not demonstrate a severely

> disabling emotional condition adequate for intentional infliction of emotional distress damages.

Walston v. Monumental Life Ins. Co., 923 P.2d 456, 464-65 (Idaho 1996) (internal quotations omitted).

In the instant case, neither plaintiff suffered a "severely disabling emotional condition" as required by Idaho law. As pointed out above, Sparrow has been in good health, has not seen a doctor or therapist, and was merely "bummed out" by his firing. Sparrow Depo. at 98-99. Waddoups likewise has worked since leaving Amalgamated Sugar, and has not been disabled. Waddoups Depo. at 8-20.

In sum, there is no evidence to support two essential elements of plaintiffs' claim for intentional infliction of emotional distress.

VII. PLAINTIFFS' NEGLIGENT OR INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE CLAIM IS GROUNDLESS.

Plaintiffs claim that by firing them for cause and with "knowledge or intent that such firing would severely hamper their opportunity for future employment," Amalgamated Sugar tortiously interfered with their prospective economic relations. Complaint at ¶ 52. Plaintiffs do not identify any wrongful "interfering" conduct by Amalgamated Sugar, nor do they identify any contractual or business relationship (in which they were involved), which was interfered with by the Company. Id. ¶¶ 52-54. Both are required by Idaho law. Idaho Nat'l Bank v. Bliss Valley Foods, 824 P.2d 841, 860-61 (Idaho 1991) (defendant must tortiously interfere with "plaintiff's contractual or business relationships"). The only relationship to which plaintiffs refer is their

"employment relationship" with Amalgamated Sugar. Complaint ¶ 54. An employer cannot tortiously interfere with its relationship with its own employees. Orstrander v. Farm Bureau Mut. Ins. Co., 851 P.2d 946, 950 (1993) ("a party cannot tortiously interfere with its own contract"). Accordingly, this claim is factually groundless and legally without merit

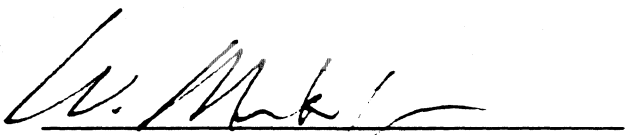
VIII. PLAINTIFFS' CONSPIRACY CLAIM SHOULD BE DISMISSED BECAUSE AMALGAMATED SUGAR CANNOT CONSPIRE WITH ITSELF.

Plaintiffs' claim that Amalgamated Sugar conspired with unidentified Doe defendants 1 through 100. Complaint ¶¶ 55-57. However, in Paragraph 3 of the Complaint, plaintiffs allege "that each of the defendants was the agent of each other in all of the actions and matter set forth; and that at all of said times herein mentioned, each was acting as the agent of the other, was acting in the course and scope of its agency with its principal, and that every act of each defendant was within the scope of its authority was known to, authorized and ratified by the others." The law is well settled that an agent cannot conspire with its principal. Ostrander v. Farm Bureau Mut. Ins. Co., 851 P.2d at 948 ("the actions of an agent are the actions of the corporation"); Wiekhorst Bros. Excavating & Equip. Co. v. Ludewig, 529 N.W.2d 33, 40 (1995) (corporation cannot conspire with agent acting it scope of her authority). Plaintiffs have failed to identify anyone with whom Amalgamated Sugar conspired or could have conspired. Accordingly, this claim is baseless.

IX. CONCLUSION

For the foregoing reasons, plaintiffs' Complaint and all causes of action contained therein should be dismissed with prejudice.

DATED this 5th day of November, 1997.



W. MARK GAVRE
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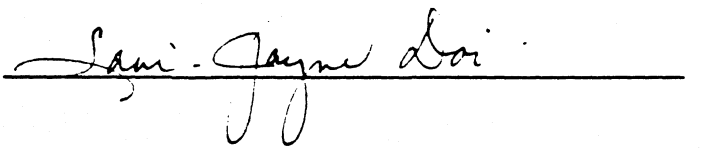
Attorneys for The Amalgamated Sugar Company

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of November, 1997, I caused to be hand-delivered a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**, to:

Trent J. Waddoups
CARR & WADDOUPS
8 East Broadway, Suite 201
Salt Lake City, Utah 84111



Tab D

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

IN AND FOR WEBER COUNTY, OGDEN DEPARTMENT, STATE OF UTAH

BLAKE WILLIAM WADDOUPS, and JAMES EDWARD SPARROW JR., Plaintiffs, vs. THE AMALGAMATED SUGAR COMPANY, a Utah corporation, et al., Defendants.	**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** DEC 09 1997 Civil No. 950900441 Judge Stanton M. Taylor

Pursuant to Rule 4-501(1)(b) of the Code of Judicial Administration, Plaintiffs present the following points and authorities in opposition to Defendant's Motion for Summary Judgment.

INTRODUCTION

As can be ascertained from Defendant's own memorandum of points and authorities, the essential facts upon which each of the causes of action are based are readily understood by the Defendant. These facts are more than sufficient to establish each of the five causes of action alleged in Plaintiffs' complaint.

Plaintiffs instituted this litigation arising out of their wrongful terminations from their employment with The Amalgamated Sugar Company ("Defendant"). After many years of loyal service to Defendant, Plaintiffs were discharged from their employment without just cause and for reasons involving violation of the laws and public policy of the State of Utah and of the United States.

Defendant, using conclusory arguments and conclusory interpretations of Plaintiffs' complaint and depositions, claims that the primary reason Plaintiffs were discharged was because they broke Defendant's rule against acquiring three "unexcused" absences. Even assuming such as true, whether Plaintiffs broke the rules raises a fundamental factual dispute which completely precludes summary judgment.

This Court well knows, pursuant to Rule 56 of the Utah Rules of Civil Procedure, it is the moving party's burden to remove all questions of material fact before summary judgment can be rendered. Defendant, rather than precluding any factual dispute as to whether Plaintiffs were fired for whistleblowing, completely fails to address the question.

Plaintiffs' terminations were pretextual to the extent that they were arbitrary, and prompted by Plaintiffs refusals to engage in or cooperate with illegal and improper activity.

Furthermore, It appears that Defendant has wilfully failed to comply with discovery, which should be an independent basis for denying its motion for summary judgment. The Court shall apply the strictest standard of review in reviewing this motion. The motion is premature and should be summarily denied. Many facts are in dispute and Plaintiffs have had insufficient

time and insufficient cooperation from Defendant to ascertain the facts forming the basis of their causes of action.

The facts presented by Defendant as undisputed are taken out of context and are vigorously disputed. Defendant misrepresents the law and the applicable tests for each argument it makes, and it does not meet its burden of proving all elements of the tests which are applicable to the questions it presents.

PLAINTIFFS' RESPONSES TO DEFENDANT'S "STATEMENT OF FACTS"

1. Undisputed.

2. Undisputed.

3. Undisputed.

4. Undisputed that the collective bargaining agreement provides a "just cause" standard under which Plaintiffs' firings will be reviewed in this Court. The "grievance process" has **no relevance** to the facts underlying Plaintiffs' claims

5. Disputed. Undisputed that "three unexcused absences" was a "rule" that was often recited at the Twin Falls Factory and that the only written memorialization of said rule reads as follows:

> You must come in, on time, every day your shift is scheduled to work. If you will be late, or absent, you must call in to the factory to report it. [ ] Failure to do this is grounds for immediate dismissal. It is <u>your responsibility to get to work and be on time.</u> All reasons that you may choose to miss work for may not be excused. For example if you do not have a ride to work and you

> miss the full shift this absence will be unexcused. It is your responsibility to clear all absences with you supervisor. The maximum number of unexcused absences you can receive before being terminated is three (3).

6. Disputed. Undisputed that Mr. Sparrow was **assessed** "unexcused absences" on September 10, 1994 and March 25, 1995.

7. Undisputed. On May 20, 1995, Mr. Sparrow was sick, and he properly called the factory in accordance with the rule quoted in ¶ 5 above.

8. Disputed.

> Q. [Mr. Gavre] So when you called in to the company in the morning [before 6:00 a.m.], were you already planning on going to Nevada that day?
>
> A. [Mr. Sparrow] No. I had no idea. When I called in sick I was at my mother's house. I just had — I don't know, I had nerves in my stomach or something an I was still in bed up until 3:30 [p.m.]. My ex-wife came and asked me to go to Nevada with her, and I was still in bed at the time, and I said, I guess, so I went with her.
>
> Q. So you weren't so sick that you couldn't drive to Nevada?
>
> A. I didn't drive. I rode.
>
> * * *
>
> Q. So you could have gone to work that day?
>
> A. No. I couldn't have.

Sparrow Depo. at 209. Undisputed that Mr. Sparrow was cited for speeding in Nevada and was arrested because of a prior unpaid citation. Mr. Sparrow rode as a passenger with his ex-wife to Nevada and only drove after his ex-wife received a speeding ticket and refused to continue driving. Sparrow Depo. at 211-213. Disputed that Mr. Sparrow missed four days of work. As shown above, Mr. Sparrow was sick on May 20, 1995. Mr. Sparrow was fired on May 22, 1995.

9. Disputed that Mr. Sparrow knew his absences were "unexcused" or that he had exceeded the "maximum number permitted." Undisputed that Mr. Sparrow testified that he thought the time in jail might have constituted "unexcused" absences. Disputed whether his time in jail constituted "unexcused" absences under Defendant's "rule."

10. Disputed that Mr. Sparrow was discharged for having more than three "unexcused" absences. Undisputed that Mr. Sparrow was discharged on the pretextual basis that he had received "three unexcused absences." Undisputed also that his firing occurred on May 22, 1995.

11. Undisputed. Any grievance procedure under the collective bargaining agreement has **no relevance** to the facts underlying Plaintiffs' claims.

12. Undisputed. The October, 1986 warning has **no relevance** to the facts underlying Plaintiffs' claims

13. Disputed. Undisputed that Mr. Waddoups was **assessed** an "unexcused" absence on March 19, 1988.

14. Disputed. Mr. Waddoups testified that Larry Dayley was emotional on September 28, 1993:

Q. [Mr. Gavre] But Larry Dayley did talk to you about poor attendance?

A. [Mr. Waddoups] I remember him coming up and saying **something**. It was short, it couldn't have been more than five or six words and took off. He was mad.

Waddoups Depo. at 119 (emphasis added).

15. Disputed. The written warning referenced by Defendant has **no relevance** to the facts underlying Plaintiffs' claims except to show procedures that Defendant did not follow when firing Plaintiffs.

16. Disputed. Undisputed that on June 29, 1994, Mr. Waddoups was **assessed** an "unexcused" absence. Mr. Waddoups testified:

Q. [Mr. Gavre] And then did you ask Bob Kinchelow if you could have a portion of the day off?

A. [Mr. Waddoups] I believe the remainder, yes.

Q. And what did Bob Kinchelow tell you?

A. He, I thought, said yes. . . .

* * *

Q. This Exhibit 18 says [objected to on grounds of hearsay] that Bob told you that you needed to get Vince's approval and that you threw a fit?

A. He lied.

Waddoups Depo. at 123.

17. Disputed. Undisputed that on March 3, 1995, Mr. Waddoups was **assessed** an "unexcused" absence. Undisputed that Mr. Waddoups was sick on March 3, 1995 and properly complied with Defendant's "rule" which is quoted in ¶ 5, above. Undisputed that Mr. Waddoups testified in his deposition that there was no use fighting the arbitrary characterization (as either "excused" or "unexcused") given to absences by Defendant. Waddoups Depo. at 243-44.

18. Disputed. Undisputed that Mr. Waddoups was sick on May 28, 1995 and Mr. Waddoups was assessed an "unexcused" absence for being sick. "I had called in sick because I wasn't feeling well. I don't know how he added the rest of this up." Waddoups Depo. at 261.

19. Disputed. Undisputed that Larry Dayley asserted the pretextual reason of "excessive absenteeism" when he fired Mr. Waddoups in violation of clear and substantial public policy on May 28, 1995.

20. Disputed. Undisputed that over the course of many years of employment, tardiness and absenteeism had been discussed at different times in different forms. Undisputed also that Defendant applied its "rules" arbitrarily and capriciously.

21. Undisputed. Any grievance procedure under the collective bargaining agreement has **no relevance** to the facts underlying Plaintiffs' claims.

22. Disputed. Undisputed that on February 16, 1995, Michael Davis was fatally injured when his arm and most of the blood in his body entered Defendant's sugar production system. Undisputed that some cleaning of the system occurred. Disputed that sugar being loaded on the day of the accident was shipped to an animal feed producer. Undisputed that Defendant claimed

and claims that the Quarantined Sugar was sent to an animal feed producer.

23. Undisputed that sugar stored in the Twin Falls factory was adulterated by human blood and flesh and was shipped for human consumption in violation of food safety laws.

24. Disputed. Undisputed that Mr. Waddoups and Mr. Sparrow took advantage of all internal methods of resolving issues of contamination. Undisputed also that Defendant ignored the danger that its adulterated sugar posed to the public, and Defendant violated food safety laws. Undisputed also that because of their attempt to resolve the contamination issues internally, Mr. Waddoups and Mr. Sparrow were unlawfully terminated before they were able to alert public authorities or the news media.

SUMMARY JUDGMENT STANDARD

Summary judgment is not appropriate where "motive and intent play leading roles, the proof is largely in the hands of the [Defendant], and hostile witnesses thicken the plot." Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962). Defendant seeks the entry of a summary judgment where discovery has not progressed because of Defendant's own dilatory tactics. Utah R. Civ. P. 56(f); Downtown Athletic Club v. Horman, 740 P.2d 275 (Utah App.), *cert. denied*, 765 P.2d 1277 (1987). In addition, many facts which Defendant presents as undisputed are vigorously disputed and the facts and all reasonable inferences therefrom will be viewed by this Court in the light most favorable to Plaintiffs. Sandberg v. Klein, 576 P.2d 1291 (Utah 1978) (holding that where the parties were not in complete conflict as to certain facts, but

the **understanding, intention, and consequences of those facts were vigorously disputed**, the matter was not proper for summary judgment and could only be resolved by a trial). Because Defendant has not produced any explicit facts supported by affidavit or otherwise in support of its motion for summary judgment, Plaintiffs may rely on their pleadings. See Gadd v. Olson, 685 P.2d 1041, 1045 (Utah 1984); Parrish v. Layton City Corp., 542 P.2d 1086, 1087 (Utah 1975).

In some very narrow situations, the Court may enter a summary judgment where no set of facts can be established justifying the relief sought. FMA Acceptance Co. v. Leatherby Ins. Co., 594 P2d 1332, 1335 (Utah 1979) (Reversing the trial court's grant of summary judgment but recognizing that when the facts are undisputed and no more than one reasonable conclusion can be drawn, summary judgment might theoretically be permissible).

ARGUMENT

I. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IS PREMATURE

Plaintiffs have had insufficient opportunity to conduct discovery. Defendant has been dilatory and uncooperative. On November 10, 1997, this Court conducted a Hearing on Plaintiffs' Motions to Compel (3), a Motion for Protective Order, and a Motion for discovery sanctions in the form of a Default Judgment. This is not the record of a case in which discovery has reached a stage where this Court may assume that the facts have been developed.

All of the causes of action herein are fact-sensitive. All of the facts which Plaintiffs need

to support their argument are in the exclusive control of Defendant. See Affidavit of Trent J. Waddoups attached to Plaintiffs' Motion for a Continuance.

II. PLAINTIFFS MAY AMEND THEIR COMPLAINT TO CONFORM TO THE EVIDENCE

Pursuant to Rule 15 of the Utah Rules of Civil Procedure, if Plaintiffs have not alleged sufficient facts, or if their causes of action do not allege proper bases upon which relief may be had, Plaintiffs may amend their complaint as justice requires.

III. DEFENDANT BEARS THE BURDEN OF SUPPORTING ITS ASSERTION THAT IDAHO LAW APPLIES

This Court is presumed not to know the law of foreign states. If Defendant desires to assert that Idaho law should apply to Plaintiffs' causes of action because of comity, it bears the burden of presenting notice of its assertion, it must establish its assertions about the contents of Idaho law, it must provide rules of decision upon which the Court may rely, and it must prepare the Court for all foreseeable problems associated with applying foreign law (such as if the Court attempts to apply foreign law, but is not able to discern the content of the foreign law). Defendant has wholly failed in its responsibility. Thus, the Court may summarily deny Defendant's choice of law assertion because the Court may apply the law of the forum in all cases by inferring that the parties stipulate thereto or by inferring that no conflict exists. See Doe v. Nevada Crossing, Inc., 920 F.Supp 164, 167 (D.Utah 1996) (and cases cited therein). The State of Utah "possesses exclusive jurisdiction and sovereignty over persons and property within

its territory." Pennoyer v. Neff, 95 U.S. 714 (1877).

DEFENDANT'S POINT III.

IV. PLAINTIFFS' CLAIMS ARE GOVERNED BY THE LAW OF THE FORUM — UTAH LAW

The Defendant is on a jurisdiction selecting expedition whereby it seeks to escape the application of Utah law to its tortious misconduct. While application of Idaho law may advance Idaho policies when Idaho is the forum, those policies would not be furthered by applying Idaho law in a Utah forum. For this reason, this Court will look solely to Utah law.

In 1989, the Utah Supreme Court applied the "most significant relationship" test to a question regarding intra-familial tort immunity. Forsman v. Forsman, 779 P.2d 218 (Utah 1989) ("As to the applicability of the doctrine of interspousal immunity heretofore espoused by this Court, **by reason of the particular facts and circumstances of this case**, it would appear that Utah law should not be applied." Id. at 219 (emphasis added)). The application of the "most significant relationship" test to an intra-familial tort did not necessarily extend the "adoption" of that test to all torts because the particular factors to be considered in a choice of law question vary greatly according to the cause of action which is brought.

Nevertheless, various federal courts have made "Erie Guesses," and the Utah Court of Appeals has concluded that the Utah Supreme Court would probably apply the "most significant relationship" test as articulated in Section 145 of the Restatement (Second) of Conflict of Laws to all tort actions. See Record v. Briggs, 887 P.2d 865 (Utah App. 1994); Doe v. Nevada

Crossing, Inc., 920 F.Supp 164 (D.Utah 1996). Plaintiffs do not dispute that this Court should apply the factors listed in § 6 of the Restatement (Second) of Conflicts of Law and consider the contacts listed in § 145. The approach the Court must take under the most significant contacts analysis is not the application of a bright-line test; but rather, its task is to ask all of the right questions.

The merit of this approach is that it gives to the state having the most interest in the problem paramount control over the legal issues arising out of a particular factual context, thus allowing the forum to apply the policies of the jurisdiction "most intimately concerned with the outcome of [the] particular litigation." 3 Utah L.Rev., pp. 498-99. Moreover, by stressing the significant contacts, it enables the Court, not only to reflect the relative interests of the two jurisdictions involved, but also to give effect to pragmatic considerations of "whether one rule or the other produces the best practical result." Swift & Co. v. Bankers Trust Co., 19 N.E.2d 992, 995 (N.Y. 1939).

While Defendant properly asserts that the "most significant relationship" test may be applied to this matter, it improperly analyzes the facts by applying the discredited *lex loci delictus* test. See Forsman, 779 P.2d at 219-20 (rejecting Defendant's "law of the situs" analysis). Defendant simplistically avers that the parties were in Idaho, therefore, Idaho law applies. Defendant does not attempt to apply the factors listed in § 145, and it does not even fully quote § 145 to inform the Court that the contacts listed in § 145 are to be taken into account in applying the principles listed in § 6 in order to determine the central question: Which state has

the most significant interest in applying its law to the underlying facts? See Doe v. Nevada Crossing, Inc., 920 F.Supp 164, 167 (D.Utah 1996).

The proper application of all the factors listed below inescapably leads to the conclusion that Utah's substantive law is the governing law. Section 145 provides as follows:

> **§ 145. The General Principle**
>
> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
>
> (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:[1]
>
> (a) the place where the injury occurred,
> (b) the place where the conduct causing the injury occurred,
> (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
> (d) the place where the relationship, if any, between the parties is centered.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Restatement (Second) Conflict of Laws, § 145. The Court will take the above-listed considerations into account when applying the principles listed below in § 6.

> **§ 6. Choice-of-Law Principles**
>
> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

---

[1] Note that the list of contacts is not exhaustive; but rather, the significant contacts "include" a - d.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include:

(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.

Restatement (Second) Conflict of Laws, § 6.

The value goals of § 6 and the contacts of § 145 should be "evaluated according to their relative importance with respect to" Plaintiffs' causes of action.[2] The policies evaluated by the court in the intrafamilial cause of action discussed in Forsman are not the policies underlying the causes of action in this case.

In this case, the most important factors are: (A) The place where the injury occurred, Restatement § 145(2)(a); (B) The relevant policies of the forum, Restatement § 6(2)(b); (C) The relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, Restatement § 6(2)(b); (D) The basic policies underlying the particular field of law, Restatement § 6(2)(d); and (E) Ease in the determination and application of the law to be applied, Restatement § 6(2)(g).

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[2] Professor Weintraub of the University of Texas Law School proposes that: "If two or more states having contacts with the parties or the transactions will have the policies underlying their different tort rules advanced, apply the law that will favor the **plaintiff** . . . ." Russell Weintraub, Commentary on the Conflict of Laws at 360 (3d Ed. 1986) (emphasis added).

Defendant utterly failed to explain the relevant policies underlying Idaho law, to compare the relative interests of Idaho and Utah in the determination of the particular issues in this matter, or even to tell the Court what Idaho law is. Restatement § 6(2)(b).

A. PURSUANT TO § 145(2)(a), THE INJURY OCCURRED IN UTAH, AND THIS COURT SHOULD APPLY UTAH LAW.

The Defendant confuses the place where the injury occurred with the place where the Plaintiffs suffered their money damages for which Defendant is liable. At first blush, this rephrasing may appear cosmetic; however, it is fundamental to this choice of law issue under the most significant contacts analysis.

The injury for which Plaintiffs seek redress under the law is Defendant's violation of Utah's clear and substantial public policies regarding food safety and the termination of employees who advance those public policies. The "injury" is not the amount of money damages that this Defendant will ultimately be required to pay to Plaintiffs as a result of its tortious misconduct. The "injury" is the contravention of Utah's vital state interests. The "injury" includes the damage to public health perpetrated by a Utah corporation, the damage to employment relationships where a Utah corporation punishes employees who refuse to commit an unlawful act, the damage to an unsuspecting public which is not protected by citizen crimefighters promoting clear and substantial Utah public policies, etc. The "injury" was caused by Defendant's reckless conduct which originated in Utah and was inflicted upon Plaintiffs in Idaho. Restatement §§ 145(2)(a), (b). The cause of action for wrongful discharge in violation of

public policy would not exist but for the very high value which Utah places on food safety and the jobs of those who attempt to further that clear and substantial public policy.

Judge Boyce's analysis in Doe v. Nevada Crossing, Inc., 920 F.Supp 164 (D.Utah 1996) gives proper guidance to this Court by distinguishing between the "money damages" suffered by Plaintiffs and the "injury" which occurred in the State of Utah. In Doe, the plaintiffs, a husband and wife, were violently assaulted in a hotel in Wendover, Nevada. Id. at 165. The dispute in Doe centered on the plaintiffs' motion to amend their complaint to add a claim for loss of consortium. Id. Utah does not recognize a cause of action for loss of consortium while Nevada does. Id. The plaintiffs wanted to apply Nevada law while the Defendant wanted to apply Utah law. Id. The judge noted that "[t]he wrongful conduct of defendants occurred in Nevada. The injury to the plaintiffs' persons from the assault was in Nevada. **The injury to the plaintiffs' consortium was in Utah.**" Id. at 168 (emphasis added). The judge found that the injury complained of occurred in Utah because the marital union existed in Utah, and a consortium claim is a claim of injury to the marital union. Id. Finally, the judge concluded that Utah law applies because "[t]he interest in choice of law is that of the states involved not the individual parties," and Utah has the more significant relationship to the marital union that was injured by the violent assault. Id. (citing Restatement (Second) Conflict of Laws, § 6). Just as Mr. and Mrs. Doe's consortium was injured in Utah, the injury to Utah's public policy which is underlies Plaintiffs' claims occurred in in Utah.

1. A Cause of Action for Wrongful Termination in Violation of Public Policy Is a Claim That Defendant Violated Utah's Public Policy, Therefore, the Place of the Injury Is Utah.

Defendant's violation of public policy rendered an otherwise private matter repugnant to the public good. The public policy exception to the employment-at-will doctrine is an attempt to balance the competing interests of society, employees and employers. When an employee is fired in a manner or for a reason that contravenes a clear and substantial public policy, society will impose sanctions on the employer. Actions by an employee which are protected under the public policy exception include: "(1) refusing to commit an illegal or wrongful act, (2) performing a public obligation, or (3) exercising a legal right or privilege." Petersen v. Browning, 832 P.2d 1280, 1281 (Utah 1992).[3] In sum, actions by an employee merit legal protection in this State "when the statutory language expressing the public conscience is clear and when the affected interests of society are substantial." Id. at 1282. Defendant does not challenge Plaintiffs' assertion that the Federal Food, Drug and Cosmetics Act, the Utah Wholesome Food Act, or the Utah Commercial Feed Act (jointly, the "Act") constitute clear and substantial public policy. 21 U.S.C.S. §301, et seq.; Utah Code Ann. § 4-5-1, et seq.; Utah Code Ann. § 4-12-1, et seq.. Plaintiffs performed acts that public policy would encourage and refused to perform acts that public policy would condemn.

Firing those who attempt to further clear and substantial public policy gives rise to a

[3] Plaintiffs' conduct fell into categories (1) & (3). Plaintiffs refused to commit criminal acts, and they promoted public policy. Category (2) usually applies to such conduct as performing jury duty.

cause of action which sounds in tort because the injury caused by such an action is perpetrated against the public, as opposed to the parties only.

> [T]he vindication of public policy worked by the tort cause of action cannot be accomplished by a contractual provision that prohibits discharges for any but just cause. Even when a contract prohibits conduct that also would violate public policy, the remedies for breach of that contract would satisfy only the private interests of the parties to the agreement, i.e., by restoring a wrongfully discharged employee to his or her position and making him or her whole. There is no reason to expect that these remedies would be as draconian as those that might be available under the tort cause of action, **remedies that are designed not only to remedy the breach and make the employee whole but to deter and punish violations of vital state interest.** While any employer violating a contractual just-cause standard of dismissal should be liable for breaking its promise to its employee, Peterson dictates that an employer who violates clear and substantial public policies should be liable for the more expansive penalties of tort, a potentially harsher liability commensurate with the greater **wrong against society.** When an employer's act violates both the contractual just-cause standard and a clear and substantial public policy, we see no reason to dilute the force of the double sanction. In such an instance, the employer is liable for two breaches, one in contract and one in tort. It therefore must bear the consequences of both.

Retherford v. AT & T Communications, 844 P.2d 949, 955 (Utah 1992) (emphasis added) (citing Peterson v. Browning, 832 P.2d 1280 (Utah 1992)).

The tort of wrongful discharge in violation of public policy affects the conduct of Utah's employers by imposing punitive damages.[4] "[P]otential punitive damages will exert a **valuable**

[4] The Court should advance the forum's governmental interests by applying the "better rule of law" — Utah law. See Leflar, McDougal & Felix, American Conflicts Law, 279 (4th ed. 1986).

deterrent effect on employers who might otherwise subject their employees to a choice between violating the law or losing their jobs." Peterson 832 P.2d at 1285 (emphasis added). The State of Utah has an extremely strong state interest in providing "an incentive for employers to refrain from using their unique economic position to coerce employee conduct that contravenes clear and substantial public policies. Moreover, it will encourage employees to engage in lawful conduct and report violations of the law." Id. (citing with approval, Boyle v. Vista Eyewear, Inc., 700 S.W.2d 859 (Mo. Ct. App. 1985) (wrongful discharge action based on violation of federal Food and Drug Administration regulations)). Furthermore, Utah protects employees whether the applicable law forming the basis of the public policy "is that of Utah, the federal government, or another state." Id. at 1283.

Utah has a very strong interest in protecting its clear and substantial public policies whereas Idaho has no interest[5] in the injury suffered by Utah's public. The place of the conduct causing the injury bears little relation to the governmental interests of the two potentially interested states. The injury, in the instant case, was an injury to this state's vital interest in clean food and its interest in protecting those who are fired for promoting this clear and substantial

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[5] Defendant bears the burden of showing that Idaho has any interest in this matter. In the absence of such a showing, the Court will conclude that Idaho has no interest. "If the Court finds that one state has an interest in the application of its policy in the circumstances of the case and the other has none, it should apply the law of the interested state." Brainerd Currie, Notes on Methods and Objectives in the Conflict of Laws, Duke L.J. 171, 178 (1959).

See also Restatement § 6(2)(c).

public policy.[6]

If Idaho law would also dictate that Defendant violated clear and substantial public policies, then the conflict between Idaho law and Utah law is a "false conflict" because both State's laws are the same. Where the Court encounters a "false conflict," the Court should apply its own law with which it is more familiar and adept. Restatement at § 6(2)(g). In the process, the Court will advance predictability and uniformity of result and protect justified expectations. Restatement at § 6(2)(d), (f).

In sum, the injury relating to the tort of wrongful discharge in violation of public policy occurred in Utah. Food which is contaminated in Idaho does not stay in Idaho. The interest in guarding against dirty food brought into Utah by protecting employees who further that interest and seek protection in Utah courts gives Utah a more significant interest in protecting Plaintiffs than Idaho.[7] Because Utah imposes severe penalties on irresponsible employers like Defendant, Utah has demonstrated its more significant interest, and Utah law applies.

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[6] In terms of the age-old example of shooting a bullet across state lines: The gun was located in Idaho, the trigger was pulled from Utah by a Utah corporation, the bullet wounded one Idaho domiciliary and one Utah domiciliary in Idaho, then the bullet ricocheted off the two victims and severely wounded the State of Utah through injury to Utah's public policy.

[7] "If the Court finds that a conflict between the legitimate interest of the two states is unavoidable, it should apply the law of the forum." Brainerd Currie, Notes on Methods and Objectives in the Conflict of Laws, Duke L.J. 171, 178 (1959).

B. PURSUANT TO § 145(2)(b), THE CONDUCT CAUSING THE INJURY TO UTAH'S PUBLIC POLICY ORIGINATED WITH DEFENDANT'S MANAGEMENT WHICH IS BASED IN UTAH.

The state of Utah has a strong interest in regulating the unlawful actions of its citizens (Defendant) and in protecting its citizens from unlawful abuse (Plaintiffs). Utah shall not be the Barbary Coast of corporate pirates. If a Utah corporation does business in other states where it wreaks havoc (especially when that havoc returns to Utah in the form of adulterated food), Utah has a strong interest in applying its laws to regulate and protect its citizens.[8]

Defendant is incorporated in Utah and manages its factories from its headquarters in Ogden, Utah. Defendant represents that this is a "weak" contact with the state of Utah. Common sense, standard business practices, and Plaintiffs' uncontested allegations dictate otherwise. The corporation's management located at its headquarters formulates and enforces the business practices, rules, and regulations that lie at the fore of Plaintiffs' causes of action in this case. Defendant's employees' and managers' attitudes and conduct regarding issues such as: "adulterated food vs. quantity of production" were developed with reference to the attitudes and conduct of Defendant's management at its headquarters. These attitudes and conduct fostered

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[8] The United States Supreme Court held in Steele v. Bulova Watch Co. that the United States is not barred by international law from governing the conduct of its citizens on the high seas or in foreign countries. 344 U.S. 280 (1952).

For example, United States securities laws apply to fraud involving securities representing ownership interests in domestic corporations which are sold in foreign countries. This is true even where the only victims of the fraud are foreigners. The United States has a strong interest in punishing the misconduct of its own citizens for the disregard of its law and the misuse of United States' law which gives the appearance that the United States approves of such misconduct.

the corporation's culture which requires conduct in conformity with developed corporate customs. Such developed customs are especially important in this corporation which, according to its answers to Plaintiffs' discovery requests, has no written policies on very important matters. Those weaned on Defendant's culture approved of illegally sending adulterated sugar to be eaten by children and disapproved of (and fired) those who stood athwart its bandwagon culture screaming "stop!"[9]

Plaintiffs believe and allege that the order to fire them came directly from Ogden, Utah. Plaintiffs plan to develop this belief through additional discovery.

C. PURSUANT TO § 145(2)(c), THE DOMICIL OF PLAINTIFF BLAKE WADDOUPS IS UTAH AND THE DOMICIL OF DEFENDANT IS UTAH, THEREFORE UTAH LAW APPLIES.

Plaintiff Blake Waddoups is a domiciliary of Utah. Utah is Mr. Waddoups's domicile of origin (he was born here) and it is his domicile of choice (he intends to return here). Defendant correctly argues that both Plaintiffs resided in Idaho at the time when Defendant tortiously fired them. However, Defendant fails to address the "domicile" of Plaintiffs. Domicile is determined largely by the subjective intent of the parties.[10]

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[9] This is a motion for summary judgment and the Court will view all facts in the light most favorable to Plaintiffs.

[10] Plaintiffs would present affidavits supporting their assertion that Mr. Waddoups is a Utah domiciliary; however, Plaintiffs do not bear that burden on this motion for summary judgment because Defendant merely made yet another conclusory statement. Utah R. Civ. P. 56(e); See Gadd v. Olson, 685 P.2d 1041, 1045 (Utah 1984) (holding that the requirement in Rule 56(b) is inapplicable if the moving party does not support its motion with affidavits); accord Parrish v. Layton City Corp., 542 P.2d 1086, 1087 (Utah 1975).

Two-thirds of the parties (Defendant and one-half of the Plaintiffs) are domiciled in the state of Utah. Utah has a predominant continuing interest in applying its laws to this case involving its citizens.

D. PURSUANT TO § 145(2)(d), THE RELATIONSHIP BETWEEN THE PARTIES **IS** CENTERED IN UTAH, THEREFORE, UTAH LAW APPLIES.

Even if two-thirds of the parties were not domiciled in Utah, Utah still has a predominant interest in applying its laws to "those who seek relief in its courts." Wallis v. Mrs. Smith's Pie Co., 550 S.W.2d 453, 458 (Ark. 1977). The only place where a relationship exists between the parties **is** this Court. See Restatement § 145(2)(d) ("(d) the place where the relationship, if any, between the parties **is** centered.") (emphasis added).

1. The Contract Is Not Relevant to Defendant's Tortious Conduct, Therefore, The Situs in Which The Contract Was Entered Is Irrelevant.

"Because the public policy exception is imposed by law, the . . . agreement is involved only because it forms the basis of the relationship; the agreement is tangential to the" tortious misconduct. Peterson v. Browning, 832 P.2d 1280, 1284 (Utah 1992). The collective bargaining agreement entered into between Plaintiffs and Defendant formed the basis of the relationship between the parties; however, the breach of the just-cause term of the contract was merely tangential to Defendant's breach of its duty to the people of Utah which is imposed by Utah's clear and substantial public policy relating to food safety. Moreover, the detriment imposed upon Plaintiffs by Defendant "inure[s] to the [detriment] of the public." Id.

DEFENDANT'S POINT IV.

V. DEFENDANT VIOLATED CLEAR AND SUBSTANTIAL PUBLIC POLICY

Defendant concludes that Plaintiffs have no cause of action for wrongful termination based upon its circular argument/conclusion set forth in its memorandum at Point IV, p. 10. Defendant's argument concludes, in essence: Idaho law applies because it is the law of the situs, thus Utah law does not apply, and hence Defendant should argue Idaho law regarding wrongful discharge; however, Plaintiffs' claim should be dismissed because Plaintiffs only alleged that Defendant violated Utah's public policy in their complaint. See Defendant's memo. at p. 10 (emphasis in original). But see, Records v. Briggs, 887 P.2d 864, 869 (Utah App. 1994) ("In characterizing a cause of action, Utah courts look to the nature of the action and not the pleading labels chosen.") Defendant cites no Idaho law indicating no cause of action in Idaho, no caselaw supporting the hypertechnical reading of complaints in notice-pleading jurisdictions, no statutes, no commentators, etc.

DEFENDANT'S POINT V.

VI. PLAINTIFFS' FAILURE TO REPORT DEFENDANT'S CRIMINAL CONDUCT TO GOVERNMENTAL AUTHORITIES DOES NOT BAR THEIR CLAIM

Defendant grossly misstates the public policy exception to at-will employment and grossly misinterprets Fox v. MCI Communications Corp., 931 P.2d 857 (Utah 1997). The Utah Supreme Court stated in Heslop:

> We do not agree that plaintiff cannot meet a public policy requirement simply because he did not report the violation to the Attorney General or to the Commissioner. Plaintiff pursued all internal methods for resolving the problem; he need not have gone outside the Bank to try to correct the policy violation.

Heslop v. Bank of Utah, 839 P.2d 828, 838 (Utah 1992). In Fox v. MCI, the Supreme Court held:

> [T]he termination of a private sector employee in retaliation for the good faith reporting to company management of alleged violations by co-workers of Utah Code Ann. §§76-6-403, 76-6-405, 76-6-703, or 76-6-705 (1995), does not implicate a clear and substantial public policy of the state of Utah.

Fox v. MCI Communications Corp., 931 P.2d 857 (Utah 1997). Did the court overrule its holding in Heslop? No.

In Heslop, the plaintiff claimed that the defendant fired him because of his insistence that the defendant bank comply with the Utah Financial Institutions Act found at Utah Code Ann. § 7-1-318. The court concluded that the act "serves a substantial public policy because **it protects the public** as well as regulates the institutions themselves." Heslop 839 P.2d at 837 (emphasis added).

In Fox v. MCI, the plaintiff claimed that the defendant fired her after she reported violations of criminal laws relating to "computer fraud." The computer fraud related to "churning" accounts to meet internal quotas and to earn higher commissions. In other words, the victim of the alleged crime was the defendant itself and **not the public**. "The churning and creation of 'new' accounts, while clearly intended to produce higher pay for the employees, was

a practice defendant knew about and, by tolerating it, acquiesced in. For that reason, the corporation was not defrauded." Id. at 860. There was no fraud because the only effect of the conduct would be felt by the defendant (and not the public), therefore, the only "clear and substantial public policy" that plaintiff could state would be the public policy which encourages reporting criminal activity to public authorities which Ms. Fox did not do.

Generally, whistleblowers who complain internally, but who have not contacted an appropriate enforcement authority are protected by state laws. "[T]he rationale . . . is that loyal employees, who do not go outside their organizations, should not have less protection than employees who could be considered more disruptive by complaining outside their organizations." Westman, Daniel P., Whistleblowing. The Law of Retaliatory Discharge at 114 (1991). An employee working under Defendant's purported "rule of law" would be faced with the peril of reprisal without legal remedy in exchange for performing public obligations.

Defendant's theory does not promote public policy. An employee's reporting unsanitary conditions within the workplace is action in furtherance of Utah's firmly held public policy favoring safe and clean food. Concomitantly, retaliation against the reporting employee as a punitive measure and a deterrent to other observers of unsanitary conditions directly affronts that policy. "[I]t would seem that a business ought to welcome an employee's disclosure of significant" product-quality problems unless, of course, it would unduly damage product-quantity goals. Fox v. MCI, 931 P.2d at 859.

After Fox v. MCI, Plaintiffs could not have based their claims on the public policy which

encourages reporting criminal activity to public authorities. Fortunately, Plaintiffs **never alleged the violation of that public policy**. Defendant pulled a chair out from under nobody. It did not unseat Plaintiffs' claims.

In sum, Plaintiffs alleged that they threatened to reveal the unsanitary conditions of Defendant's inventory shortly before being fired.[11] During the two months which passed between the contamination and Plaintiffs' firings, Plaintiffs made clear their refusals to engage in illegal activity and actively sought to determine whether merely holding adulterated food constitutes a criminal violation (it does). Plaintiffs demanded that Defendant conduct a thorough investigation (it pretended to investigate to placate Plaintiffs). Plaintiffs diligently demanded that Defendant follow its own rules on conducting investigations regarding contamination after they found out that Defendant performed a sham investigation (it never did). The foregoing states a claim for wrongful termination in violation of public policy because Plaintiffs furthered public policy and refused to engage in illegal activities.

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[11] See e.g., Gifford v. Atchinson, Topeka & Santa Fe Ry., 685 F.2d 1149 (9th Cir. 1982) (holding, in the Title VII context, that there is no legal distinction between filing a complaint and threatening to file a complaint).

DEFENDANT'S POINT VI.

VII. PLAINTIFFS' CAUSE OF ACTION FOR EMOTIONAL DISTRESS IS NOT BARRED BY ANY STATUTORY SCHEME

A. IDAHO COURTS RECOGNIZE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIMS CONCURRENT WITH CLAIMS FOR WRONGFUL TERMINATION.

There is no need for this Court to address Defendant's purported interpretation of the Idaho Workmen's Compensation Act because the Idaho courts have recognized claims for emotional distress concurrent with claims for wrongful termination. See e.g., Holmes v. Union Oil Co. of California, 760 P.2d 1189, 1197 (Idaho App. 1988). The rationale of these cases is that the actions were not part of the normal employment relationship. Rather, the misconduct constituted a pattern of pre-termination harassment in retaliation for internal complaints. Moreover, the tort of intentional infliction of emotional distress is not a mechanism geared toward reimbursing a person for injury; but rather, it is an intentional tort which sanctions antisocial behavior.

Under Idaho's Worker's Compensation statute, Defendant's arguments ring hollow. How does an intentional act come within the definition of an accident?

> "Accident" means an unexpected, undesigned, and unlooked for mishap, or untoward event connected with the industry in which it occurs, and which can be reasonably located as to time and place where it occurred causing an injury.

I.C. § 72-102(14)(b). An intentional act which forms the basis of the tort of intentional infliction of emotional distress can never fit the definition of accident and is not pre-empted.

If the Court were to consider Defendant's argument, it would dismiss it because: Plaintiffs have not conducted enough discovery; Plaintiffs have not begun assessing the damages they sustained yet (including the amount or degree of their mental damages); The question of whether the physical abuse in question was authorized is a question of fact (even if the physical abuse was not authorized at the time, it may have been subsequently ratified by Defendant); Defendant's physical abuse constitutes the independent tort of battery; etc.

B. PLAINTIFFS' CLAIMS ARE NOT SUBJECT TO THE LMRA UNDER THE RETHERFORD ANALYSIS.

Defendant owed Plaintiffs the duty not to outrageously harass, humiliate, ridicule, and embarrass them.[12] This duty did not arise from the collective bargaining agreement (the "CBA"); but rather, Defendant owes every member of society the same duty. Because Plaintiffs' cause of action exists separate and apart from the CBA (i.e., it is not a contract cause of action), the claim is not pre-empted by the LMRA. See Farmer v. United Brotherhood of Carpenters, 430 U.S. 290, 305, 06 (1977) (holding that intentional infliction of emotional distress claim against union and officials was not pre-empted).[13]

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[12] See e.g., Knafel v. Pepsi-Cola Bottlers, Inc., 899 F.2d 1473 (6th Cir. 1990) (finding that plaintiff's claim that she was singled out to, *inter alia*, do jobs that the employer knew would exacerbate back condition was not pre-empted); Malone v. Safeway Stores, Inc., 698 F.Supp. 207 (D.Oregon 1977) (holding that claims which included threatening to "get rid of" plaintiff was outrageous conduct not covered by the CBA).

[13] The test of LMRA preemption was also explained by the United States Supreme Court in Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) (ruling that a state action asserting a right related to a CBA is not pre-empted unless it is "inextricably intertwined" with the CBA); and Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988) (holding that a retaliatory

Contrary to Defendant's assertion, the Retherford court did not dismiss all of Ms. Retherford's emotional distress claims. The court carefully considered Ms. Retherford's specific allegations and concluded that some of the allegations were pre-empted and some were not. Retherford, 844 P.2d at 971. The Retherford court explained the test as follows: "To Determine whether this tort claim is preempted, we must determine whether . . . there is any basis for concluding that defendant's conduct alleged to provide a basis for the tort claim might reasonably implicate any of the terms of the [CBA]." Retherford v. AT&T Communications, 844 P.2d 949, 971 (Utah 1992) (citing Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988).

The Retherford court adopted the distinction between "purely personal misconduct, as opposed to misconduct under color of possible contractual authority. . . ." Retherford, 844 P.2d at 972. Therefore, Defendant bears the burden of presenting this Court with specific provisions of the CBA which set forth contractual authority of its managers and which it claims will be in need of interpretation by this Court. Defendant has utterly failed to bear it burden and inform this Court.

The mere conclusory assertion by Defendant that its actions were "supervisory" is not sufficient. Defendant concludes that its misconduct was supervisory: "Indeed, plaintiffs allege that the acts were within the scope and course of employment." Defendant's Memo. at p. 15. The Retherford court explained that (under a theory of negligent employment) there is "no need

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discharge action was not pre-empted).

to consult the [CBA] to determine whether [abusive employees] were acting within the scope of their employment." Retherford, 844 P.2d at 973.

Retherford explained the method of categorizing Defendant's misconduct as either purely personal or the exercise of supervisory authority. The court concluded that certain conduct alleged by Ms. Retherford was "supervisory" and thus contractual: AT&T ordered Retherford to transfer to Boise, it told her to stop complaining, it told her where to sit, it assigned her certain tasks. Retherford, 844 P.2d at 972. The court concluded that certain other conduct alleged by Ms. Retherford was purely personal: following her around the office, making threatening faces, attempting to frighten her as she walked across the street. Retherford, 844 P.2d at 972.

1. Defendant's Conduct Toward Plaintiffs Was Purely Personal.

Defendant's misconduct was purely personal despite Defendant's conclusion that Plaintiffs allege "supervisory" abuse. Defendant concludes that three of Plaintiffs allegations are allegations of supervisory abuse, it ignores Plaintiffs' other allegations, and it has prevented discovery which could uncover additional violations.

First, Defendant failed to provide Mr. Waddoups with psychological counseling and gamma globulin shots which were provided to all other employees. Complaint at ¶ 47. It is true that the decision to offer psychological counseling is a supervisory function which would be pre-empted; however, it is **not** a supervisory function to single-out one person to whom counseling and medical help would not be offered. At the very least, this is a material disputed fact.

Second, Defendant implied that Mr. Waddoups was responsible for the death of his co-

worker, that he was responsible for the contamination of all of the sugar in the factory, and he would be the scapegoat if criminal charges were brought. Complaint at ¶47(a). It cannot be argued that the CBA somehow governs the great American pastime of "covering your ass." CYA is purely personal misconduct which is separate and distinct from the CBA. Defendant's "purely personal" desire to engage in purely personal attacks on co-workers does not implicate the CBA. If these managers had made a thorough investigation and had "exercised their contractual authority" by naming Mr. Waddoups as the culpable party, then their misconduct would be pre-empted. Defendant's managers practiced the art of career advancement through the well-placed shiv. Spreading unfounded rumors and making obnoxious innuendo is purely personal.

Third, Mr. Sparrow's supervisor slapped him and asked him frequently: "Is today the day I get to fire you?" In Retherford, the court examined physical abuse (which is clearly personal) and threats of firing for complaining about a co-worker's homosexual advances. The court held that Ms. Retherford's supervisor exercised her supervisory authority when she told Ms. Retherford to stop complaining or she might be fired. It is true that the use of supervisory authority to quell dissension among employees is "supervisory" even if it is done improperly with an improper motive (for LMRA pre-emption purposes). In Douglas, the Seventh Circuit Court held that "supervisory" functions relate to "allegedly arbitrary denials of her requests for days off, an 'unjustified' final warning, and 'unwarranted and excessive' scrutiny of her work." Retherford, 844 P.2d at 972. If Plaintiffs simply alleged threats to fire, such an allegation would

be pre-empted. However, Plaintiffs allege threats to fire that are not based upon performance or made under the color of any contractual authority; but rather, are coupled with unwarranted physical abuse which (one assumes) is not the subject of any provision of the CBA. The threats to fire were made not to reprove Mr. Sparrow's conduct; but rather, Defendant made the threats in a sinister manner as if to say: "I would personally like to fire you today, but my supervisory authority does not allow it."

Fourth, Defendant fails to mention Plaintiffs' allegation that one of Defendant's managers stood behind Mr. Waddoups during exercises and simulated a homosexual act. Complaint at ¶47(b). The reference of the obscene act was Mike Davis (the fatally injured co-worker who was gay) and the blame that the manager personally intended to place upon Mr. Waddoups for the death of his co-worker. Again, one assumes that simulated, homosexual sex-acts are not within the description of authority and responsibility as set forth in the CBA; however, because Defendant fails to point to any provision of the CBA which might be applicable, the Court is left to speculate.

Whether a claim for intentional infliction of emotional distress is preempted by the LMRA depends on the degree of outrageousness of the conduct and the manner in which the conduct was performed. See Farmer v. United Brotherhood of Carpenters, 430 U.S. 290, 305, 06 (1977) (holding that intentional infliction of emotional distress claim against union and officials was not preempted by the LMRA under the "abusive manner" exception). The test is whether the state law cause of action is "inextricably intertwined" with the state law cause of action. In

this case, the intentional infliction of emotional distress claim requires that the Court look at the conduct of the employer without interpreting the CBA.

C. WHETHER PLAINTIFFS' CLAIMS ARE "INEXTRICABLY INTERTWINED" WITH THE CBA IS A QUESTION OF FACT.

The tort of intentional infliction of emotional distress requires that Plaintiffs prove that: "[D]efendant intentionally engaged in some conduct toward the plaintiff[s], (a) with the purpose of inflicting emotional distress, or (b) where any reasonable person would have known that such would result; and his actions are of such a nature as to be considered outrageous and intolerable in that they offend against the generally accepted standards of decency and morality." Robertson v. Utah Fuel Co., 889 P.2d 1382, 1388 (Utah App. 1995) (citing Samms v. Eccles, 358 P.2d 344, 347 (Utah 1961)).

Defendant concludes, without explanation or analysis, that the conduct described above is not "outrageous." Defendant's Memo. at 15. Accusing someone of negligent homicide is not outrageous, and as a matter of law a reasonable jury could not find that such conduct was outrageous? Threatening someone with criminal sanctions unless he chooses to be a "team player" and help ship $9 million dollars worth of adulterated sugar to the public is not outrageous, and as a matter of law a reasonable jury could not find that such conduct was outrageous? Performing simulated, homosexual sex-acts on co-workers during company-mandated exercises is not outrageous, and as a matter of law a reasonable jury could not find that such conduct was outrageous? Slapping someone with a notebook and threatening him with

being fired for pure entertainment value is not outrageous, and as a matter of law a reasonable jury could not find that such conduct was outrageous? Defendant's conclusion that its conduct was acceptable is outrageous.

Plaintiffs suffered disabling emotional distress. Mr. Sparrow could not emotionally bring himself to look for work for an entire month after his unlawful firing.

> Q. [Mr. Gavre] And have you been in good health since May '95 when you left Amalgamated?
>
> A. [Mr. Sparrow] No.
>
> Q. Pardon?
>
> A. Not - - physically, yes, but emotionally, no.
>
> Q. Can you explain that?
>
> A. Well, just being fired it really bummed me out. It really made me feel like I was a nobody, a nothing, like I wasn't worth a fight for, to stay on there at the sugar factory when I tried so hard to do them a good job. If they knew how many breaks I missed and how many times I missed lunch to make them look good, and then they didn't try once for me. I just made me feel like I wasn't worth it and it just kind of made you go, Wow, you know.

Sparrow Depo. at 268-69. Mr. Sparrow was disabled by his emotional distress.

> Q. [Mr. Gavre] When you left Amalgamated in May of 1995, did you

immediately begin looking for work?

A. [Mr. Sparrow] I would take about a month.

Q. So you didn't look for work for about a month?

A. Correct.

Q. Were you able to work at that time? Aside from not looking for a job, were you able to work if you had a job?

A. Physically, yes, probably. Emotionally, probably not, no.

Q. And that's because, as you said, you were bummed out from being fired?

A. Well, yeah, from the results from being fired.

Sparrow Depo. at 270-71. Mr. Waddoups testified that his wife could not sleep in the same bed with him because "I would wake up screaming in the middle of the night in a cold sweat and actually hurt her just flopping around. It all goes back to this Mike Davis crap." Waddoups Depo. at 262.

Plaintiffs have not received professional psychological counseling. Mr. Sparrow testified that he had thought about procuring counseling but he and Mr. Waddoups helped themselves by talking to each other and "helped themselves through a lot . . . ." Sparrow Depo. at 270.

DEFENDANT'S POINT VII.

VIII. DEFENDANT INTENTIONALLY INTERFERED WITH PLAINTIFFS' PROSPECTIVE ECONOMIC ADVANTAGE.

After Plaintiffs' firings, Mr. Sparrow applied to work with a contractor who did work for Defendant at its Twin Falls Factory. Because Mr. Sparrow listed Defendant as his ex-employer, the contractor called Defendant. Defendant refused allow the contractor to bring Mr. Sparrow onto its premises, therefore, Mr. Sparrow was not hired. Sparrow Depo. at 270. Also, Mr. Sparrow would have been hired at Oreida; however, after Oreida called Defendant, Oreida revoked its offer. Sparrow Depo. at 270-74.

Moreover, firing Plaintiffs for unlawful reasons satisfies the elements of this tort. Any reasonable person knows that if a person is fired for bad conduct, the person's work-history is stained and the bad smell lingers indefinitely. Defendant's pretextual firings interfered with Plaintiffs' ability to gain decent employment. In fact, both Plaintiffs continue to struggle with miserable jobs making miserable wages because of Defendant's miserable misconduct.

This cause of action is valid and properly alleged. Plaintiffs' allegations stand uncontroverted.

DEFENDANT'S POINT VII.

IX. DEFENDANT CONSPIRED WITH UNIDENTIFIED INDIVIDUALS OR ENTITIES TO TERMINATE PLAINTIFFS

Defendant correctly states that it cannot conspire with itself. However, Defendant makes another attempt to dismiss a cause of action based upon a stilted reading of Plaintiffs' complaint. Records v. Briggs, 887 P.2d 864, 869 (Utah App. 1994) ("In characterizing a cause of action, Utah courts look to the nature of the action and not the pleading labels chosen.")

Plaintiffs do not quarrel with the legal standard quoted by Defendant. More discovery is needed to find evidence regarding those with whom Defendant conspired. Plaintiffs have not identified co-conspirators because Defendant has not cooperated with discovery.

CONCLUSION

Based upon the foregoing, Defendant's Motion for Summary Judgment must be denied in its entirety.

RESPECTFULLY SUBMITTED this 3 day of December, 1997.

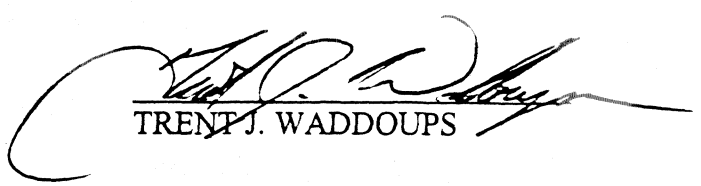
CARR & WADDOUPS

TRENT J. WADDOUPS
Attorneys for Plaintiffs

MAILING CERTIFICATE

I HEREBY CERTIFY that I caused a true and correct copy of PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT to be mailed, postage prepaid, this ___ day of December, 1997 to:

Mr. W. Mark Gavre
PARSONS, BEHLE & LATIMER
P.O. Box 45898
Salt Lake City, UT 84145-0898



TRENT J. WADDOUPS

Tab E

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IN THE SECOND JUDICIAL DISTRICT COURT

IN AND FOR WEBER COUNTY, STATE OF UTAH

* * * * * * *

BLAKE WILLIAM WADDOUPS and JAMES EDWARD SPARROW, JR.,	)	Case No. 950900441
Plaintiffs,	)	Judge Stanton M. Taylor
vs.	)	
THE AMALGAMATED SUGAR COMPANY, a Utah corporation, et al.,	)	**REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**
Defendant.	)	

* * * * * * *

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I. INTRODUCTION

More than two years have passed since plaintiffs filed their lawsuit, and there is still no evidence supporting any of their claims. In their opposition memorandum[1], plaintiffs continue to make wild allegations about Amalgamated Sugar supposedly shipping contaminated sugar. These allegations are as groundless as they were more than two years ago. Opposing counsel's inflammatory and offensive assertions are defamatory and would be actionable if they were made outside the legal process. Plaintiffs posture themselves as would-be whistleblowers. Yet it is undisputed that plaintiffs never reported any supposed contaminated sugar to the FDA, the media or anyone else (as they claim they were going to do), either while they were employed by Amalgamated Sugar or after their terminations. In sum, plaintiffs' lawsuit is groundless and borders on bad faith.

In its opening memorandum, Amalgamated Sugar explained that plaintiffs' public policy wrongful discharge claim should be dismissed because it is asserted solely under Utah law, while Idaho law is controlling. (The claim would also be groundless under Utah law.) Plaintiffs' intentional infliction of emotional distress claim is barred by the Idaho Workmen's Compensation Act, is preempted by federal labor law, and lacks essential elements of the cause of action. Plaintiffs' interference with prospective economic advantage is also factually groundless.

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[1] Plaintiff's Memorandum In Opposition to Defendant's Motion for Summary Judgment is hereinafter referred to as "Pl. Opposition Memo. at __." Memorandum In Support of Defendant's Motion for Summary Judgment is

In their opposition memorandum, plaintiffs fail to create a genuine dispute of material fact, but instead raise specious arguments, misstate the law, and mischaracterize the record. As explained below, there is no basis for plaintiffs' opposition to Amalgamated Sugar's motion for summary judgment.

II. PLAINTIFFS FAIL TO SHOW ANY GENUINE DISPUTE OF MATERIAL FACT.

Plaintiffs purport to dispute certain facts, but fail to show any genuine issue of material fact. Rule 56(e) requires plaintiffs to go beyond "mere allegations or denials," and to set forth "specific facts" supported by affidavits or other admissible evidence in the record. For each fact that plaintiffs claim is in dispute, they must "specifically refer to those portions of the record upon which [they] rel[y]." Utah Code of Judicial Administration, Rule 4-501(2)(b). Plaintiffs do not comply with the requirements of the foregoing rules. Plaintiffs merely assert that certain facts are "disputed," but provide no citation to the record. Pl. Opposition Memo. at 3-8. Accordingly, the material facts relied on by Amalgamated Sugar "shall be deemed admitted for the purpose of summary judgment." Rule 4-501(2)(b).[2]

Equally important, plaintiffs do not show any genuine dispute as to facts that are material

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hereinafter referred to as "Def. Opening Memo. at __."

[2] Webster v. Sill, 675 P.2d 1170, 1172 (Utah 1983) ("The mere assertion that an issue of fact exists without a proper evidentiary foundation to support that assertion is insufficient to preclude the granting of a summary judgment motion."); Treloggan v. Treloggan, 699 P.2d 747, 748 (Utah 1985) (where non-movant's opposition is supported by "no evidentiary facts" and expresses "unsubstantiated opinions and conclusions," summary judgment properly granted); Thornock v. Cook, 604 P.2d 934, 936 (Utah 1979) (when summary judgment motion is based on plaintiff's deposition testimony and no affidavit was filed by plaintiff in response, summary judgment appropriate).

to Amalgamated Sugar's motion. Much of what plaintiffs dispute (without basis in the record) are not material facts, but merely background information. The material facts are only those that pertain to Amalgamated Sugar's specific arguments for summary judgment with respect to plaintiffs' causes of action. As explained below, the facts actually relied on by Amalgamated Sugar are not genuinely disputed.

III. IDAHO LAW GOVERNS PLAINTIFFS' CLAIMS, AND PLAINTIFFS FAIL TO SHOW THAT UTAH LAW HAS ANY APPLICATION.

In its opening memorandum, Amalgamated Sugar explained that Utah applies the "most significant relationship" test of the Restatement (Second) of Conflict of Laws to determine the governing law in a given case. Although plaintiffs attempt to muddy the issue, Utah courts have been clear on this point:

> We apply the "most significant relationship" approach, as described in the Restatement (Second) of Conflict of Laws, in determining which state's law should apply in actions involving torts, contracts, property interests, and the like. See, e.g., Forsman v. Forsman, 779 P.2d 218, 219-20 (Utah 1989) (applying "most significant relationship" analysis to torts case).

Records v. Briggs, 887 P.2d 864, 867 (Utah App. 1994). See also Pacheco v. Hercules, Inc., 61 FEP Cases (BNA) 825, 826 (D. Utah 1993) (same); Doe v. Nevada Crossing, Inc., 920 F.Supp. 164, 166 (D. Utah 1996) (same).

Plaintiffs in substance admit that Utah applies the "most significant relationship" test in deciding choice of law questions. Pl. Opposition Memo. at 11-12. The application of the "most significant relationship" test to the instant case makes clear that Idaho law governs plaintiffs'

claims because the parties, the events at issue, and the alleged injuries were all located in Idaho. Def. Opening Memo. at 8-9. Plaintiffs, however, attempt to avoid this obvious conclusion by misconstruing and misapplying the "most significant relationship" test. Despite plaintiffs' efforts, it is clear that all the relevant factors support the application of Idaho law to plaintiffs' lawsuit (which consists of three tort claims).[3]

Under the "most significant relationship" test, the following factors determine which state's law to apply in tort cases:

(1) The place where the injury occurred;

(2) The place where the conduct causing the injury occurred;

(3) The domicile, residence, nationality, place of incorporation and place of business of the parties; and

(4) The place where the relationship, if any, between the parties is centered.

Restatement (Second) of Conflict of Laws § 145.

The proper application of the above four factors is illustrated by Judge Greene's decision in Pacheco v. Hercules, Inc. In that case, Hercules hired the plaintiff in Utah in 1968 where he worked for 19 years, until he was transferred (temporarily) to a company facility in Georgia in 1987. In Georgia, the plaintiff allegedly was subjected to tortious misconduct by a coworker and

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[3] Plaintiffs contest the application of Idaho law only with respect to their public policy wrongful discharge claim. Plaintiffs admit that Idaho law governs their intentional infliction of emotional distress claim, and are silent as to what law governs their interference with prospective economic advantage claim. Pl. Opposition Memo. at 28, 37.

a supervisor, suffered severe emotional injury, and eventually lost his job. The plaintiff sued his supervisor and Hercules based on tort and contract theories. Pacheco, 61 FEP Cases at 825.

Applying the four factors of the "most significant relationship" test, Judge Greene concluded that Georgia law governed the plaintiff's claims:

> All four factors point to Georgia. The injury occurred in Georgia. The alleged conduct which caused the injury occurred in Georgia. At the time of the injury, plaintiff and defendant [supervisor] were domiciled in Georgia, and defendant Hercules, a Delaware corporation, had a place of business in Georgia. Finally, at the time of the injury, plaintiff's employment relationship was centered in Georgia. For these reasons, the court determines that Georgia law governs plaintiff's tort claim.

Pacheco, 61 FEP Cases at 826. Judge Greene also determined that the plaintiff's contract claims were governed by Georgia law. Id. at 827.

Application of the four factors to the instant case demonstrates that Idaho law governs plaintiffs' claims. The first factor is where the injury occurred. Plaintiffs allege that they were "wrongfully discharged" from their jobs at the Twin Falls, Idaho factory of Amalgamated Sugar in violation of public policy. Complaint ¶¶ 6-7, 35, 37. For this alleged injury, plaintiffs seek, inter alia, damages for "loss of earnings" and "loss of future earnings." Complaint at p. 17. Plaintiffs' "wrongful discharge" injury occurred in Idaho where they were discharged.

Plaintiffs also claim that they suffered emotional distress as a result of Amalgamated Sugar's treatment of them on the job at the Twin Falls factory. Complaint ¶¶ 47-50. This alleged injury also occurred in Idaho. Finally, plaintiffs claim that Amalgamated Sugar tortiously interfered with their prospective economic advantage by terminating them "purportedly for

cause" and thereby "hamper[ing] their opportunity for future employment." Complaint ¶ 52. Plaintiffs' subsequent unsuccessful attempts at employment took place in Idaho. Waddoups Depo. at 8-9; 11-20; Sparrow Depo. at 9-13; 16-17. This alleged injury (whether based on the Company's alleged conduct or its supposed consequences) also took place in Idaho.

In response, plaintiffs argue that their "wrongful discharge" injury is not their discharges, but "the contravention of Utah's vital state interests." Pl. Opposition Memo. at 15. This argument is nonsensical for numerous reasons. First, it begs the question of how Utah can have any "vital state interests" in plaintiffs' discharges in Twin Falls, Idaho. Plaintiffs invoke an alleged "injury suffered by Utah's public" (id. at 19), but make no attempt to show how the Utah public was affected by plaintiffs' discharges. Second, plaintiffs are not "private attorneys general" suing on behalf of the Utah public, but individuals suing for themselves over their alleged wrongful discharges in Idaho. They are seeking damages for their "[lost] earnings, emotional injuries and mental injuries." Complaint at p. 17. Third, courts have uniformly held that when an employee claims he was wrongfully discharged, the injury is the discharge (regardless of the legal theory on which the alleged wrongfulness of the act is based) and occurs at the location where the employee is discharged. Pacheco, 61 FEP Cases at 826-27.[4] In sum, plaintiffs' alleged injury is their discharges which took place in Idaho.[5]

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[4] See also Ashmore v. Northeast Pipeline, 843 F.Supp. 759, 774 (D.Me. 1994) (using the most significant relationship test to determine the appropriate law for a wrongful termination in violation of public policy claim, the court held that despite the fact that plaintiff lived in another state during the term of his employment, the law of the state where the termination occurred should apply because it was the place where both the conduct causing the injury and the injury occurred as well as the place where the employment relationship was negotiated and

The second factor under the "most significant relationship" test is where the conduct causing the injury occurred. Plaintiffs' alleged wrongful discharge injuries were caused by Amalgamated Sugar's discharging them, which occurred in Twin Falls, Idaho. It is undisputed that Mr. Sparrow was discharged by Assistant Superintendent Bill Stuart and that Mr. Waddoups was discharged by Assistant Superintendent Larry Dayley in Twin Falls, Idaho. Def. Opening Memo. at 5 (¶ 10) and 7 (¶ 19); Pl. Opposition Memo. at 5 (¶ 10) and 7 (¶ 19). Despite plaintiffs' admissions that they were discharged in Idaho by their respective Assistant Superintendents, opposing counsel argues that the actions took place in Ogden, Utah. Pl. Opposition Memo. at 21-22. Opposing counsel provides no support for this contention which contradicts plaintiffs' own testimony. Counsel's unsupported contention does not comply with the requirement of Rule 56(e) that an opposition to summary judgment must go beyond "mere allegations or denials" and must set forth "specific facts" supported by affidavits or other admissible evidence in the record. In sum, the alleged injurious conduct occurred in Idaho.

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commenced and where the plaintiff's supervisors were located).

[5] Plaintiffs cite Doe v. Nevada Crossing in support of their argument for the application of Utah law (Pl. Opposition Memo. at 16), but Doe actually demonstrates that Idaho law governs plaintiffs' claims. In Doe, the plaintiffs asserted a claim for "breach of the spousal relationship." 920 F. Supp. at 166. The court determined that Utah law governed this claim because the plaintiffs were "Utah residents who are husband and wife living in Utah," "the center of [the plaintiffs' spousal] relationship ... is in Utah" and therefore "Utah is where the damage to the relationship of [the] plaintiffs was experienced." In contrast, the plaintiffs were in "Wendover, Nevada a few miles from the Utah border" for "less than 24 hours." Because "Utah is the most significant place of [the plaintiffs'] interpersonal relationship," the court concluded that Utah law governed their claim for breach of their spousal relationship. Doe, 920 F.Supp. at 165, 167. The court reached this conclusion despite the fact Utah law does not recognize the cause of action at issue. The court then dismissed the plaintiffs' claim. 920 F. Supp. at 169.

Given that plaintiffs in the instant case lived, worked and were discharged in Idaho (and continue to live and work in Idaho) and that Amalgamated Sugar's factory which employed plaintiffs is located in Idaho, the reasoning of Doe supports the application of Idaho law to plaintiffs' lawsuit.

The third factor is the domicile, residence, place of incorporation and place of business of the parties. Plaintiffs' residence and domicile during the time of their employment and discharge by Amalgamated Sugar was Idaho. Plaintiffs' Complaint states:

> Plaintiffs, Mr. Waddoups and Mr. Sparrow, at all times material hereto, worked and resided in the County of Twin Falls, State of Idaho.

Complaint ¶ 7.[6] While Amalgamated Sugar is incorporated in Utah, its relevant place of business (where plaintiffs were employed) is Twin Falls, Idaho. Complaint ¶ 6. Thus, the third factor supports the application of Idaho law to plaintiffs' claims.

The fourth factor is where the relationship between the parties is centered. Because plaintiffs were employed by Amalgamated Sugar in Twin Falls, Idaho and because the only relationship between the parties was the employment relationship, their relationship was centered in Idaho. In response, plaintiffs argue that their relationship with Amalgamated Sugar is centered in Utah because they filed their lawsuit in Utah. Pl. Opposition Memo. at 23. This is an absurd argument because (1) the relationship at issue is that between the parties at the time of the events giving rise to the lawsuit, and (2) if plaintiffs' argument were valid they could create and "center" a relationship with anyone anywhere in the country merely by choosing where to file suit.

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[6] Opposing counsel alleges that Mr. Waddoups' domicile is Utah because he intends to move to Utah. Pl. Opposition Memo. at 22. This argument is without merit because (1) the assertion about Mr. Waddoups' alleged intent is without foundation in the record, and (2) the relevant time period for Mr. Waddoups' domicile or residence is when the events at issue occurred, i.e., when he worked and was discharged in Idaho. See, e.g., Pacheco, 61 FEP Cases at 826 ("At the time of the injury, plaintiff [was] domiciled in Georgia."). Moreover, in his deposition, Mr.

All four factors support the application of Idaho law to plaintiffs' claims. There is no basis for plaintiffs' attempt to have Utah law extended beyond its borders so as to intrude upon the affairs of Idaho. As Judge Greene observed (citing an earlier decision), the law of the state in which the employment relationship existed and the dispute arose must be applied because otherwise the state would be deprived of the ability to govern the conduct of persons, particularly foreign corporations, within its own territory.

> [T]he important interest [Idaho] has in wrongful termination cases which are based upon conduct arising inside the state [must be recognized]: The Court bases its determination on the fact that [Idaho] law governed [the company's] conduct within the state. That authority necessarily resulted in application of [Idaho] law to all other aspects of [the company's] relations with its employees. Failure to apply [Idaho] law concerning wrongful termination in this case, therefore, would produce an unprincipled exception to [Idaho's] ability to govern the affairs of foreign corporations operating within the state.

Pacheco, 61 FEP Cases at 827 n. 6 (citation omitted).

In sum, Idaho has the most significant relationship to plaintiffs' claims and therefore provides the governing law applicable to those claims.

IV. PLAINTIFFS' PUBLIC POLICY WRONGFUL DISCHARGE CLAIM FAILS BECAUSE IT IS ASSERTED UNDER UTAH LAW, NOT IDAHO LAW.

Plaintiffs' public policy wrongful discharge claim should be dismissed because it is asserted under Utah law, while Idaho law governs plaintiffs' lawsuit. Plaintiffs do not dispute, indeed insist, that their public policy wrongful discharge claim is based on Utah law. Pl.

Waddoups testified that after leaving Amalgamated Sugar, he worked in Idaho, lived in Utah for a brief period and then returned to Idaho where he now lives. Waddoups Depo. at 8-9; 11-20.

Opposition Memo. at 11-24. Because plaintiffs rely on inapplicable law (and deliberately ignore the governing law), their public policy wrongful discharge claim must be dismissed as legally groundless.

Plaintiffs apparently believe that if Utah law is not applied, they cannot assert a public policy claim. Such is not the case. Idaho recognizes a cause of action for public policy wrongful discharge[7], and therefore plaintiffs can file a motion to amend their complaint to assert a public policy wrongful discharge claim under Idaho law. However, so long as plaintiffs insist that their claim is based on Utah law and ignore governing Idaho law, their claim for public policy wrongful discharge should be dismissed.

V. PLAINTIFFS' PUBLIC POLICY CLAIM WOULD FAIL EVEN IF IT WERE GOVERNED BY UTAH LAW.

While plaintiffs' public policy wrongful discharge claim is legally groundless because they refuse to assert it under Idaho law, it is also the case that the claim would be meritless if it were governed by Utah law (which it is not). This is so because in 1997 the Utah Supreme Court clarified Utah law governing public policy wrongful discharge claims brought by "whistleblowing" employees. In Fox v. MCI Communications, the Supreme Court held that where an employee complains or "blows the whistle" on alleged criminal conduct and is fired as a consequence, the employee fails to state a public policy claim unless he reported the alleged

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[7] See, e.g., Jackson v. Minidoka Irrigation District, 563 P.2d 54 (Idaho 1977); Hummer v. Evans, 923 P.2d 981 (Idaho 1996). The Idaho public policy wrongful discharge cause of action sounds in contract while the Utah cause of action sounds in tort. Hummer, 923 P.2d at 987; Peterson v. Browning, 832 P.2d 1280, 1284-85 (Utah 1992).

criminal conduct to the public authorities. If the employee complains only to the company itself, he has not engaged in activity that is sufficiently public in character to be protected by Utah law.

In Fox, the plaintiff alleged that she was fired because she reported to company management that employees were engaged in criminal conduct. The Supreme Court held that such facts, even if true, are not sufficient to state a claim for wrongful discharge in violation of Utah public policy:

> [I]f an employee reports a criminal violation to an employer, rather than to public authorities, and is fired for making such reports, that does not, in our view, contravene a clear and substantial public policy.

Fox v. MCI Communications Corp., 931 P.2d 857, 861 (Utah 1997).[8]

Plaintiffs assert that Amalgamated Sugar engaged in criminal conduct, specifically shipping adulterated sugar in violation of the federal Food Drug and Cosmetics Act. Complaint ¶ 25 ("unlawful shipments" and "fraudulent sales" of sugar), ¶ 40 ("illegal activity") ¶ 44 (shipping "adulterated" sugar "unlawful under the FDCA, 21 U.S.C. § 331 et seq."). Plaintiffs claim that they were fired because they "threaten[ed] to expose [Amalgamated Sugar's] illegal activity" by threatening to report it to "food safety agencies of the State of Idaho and the United States or in the alternative to advise the media." Id. ¶¶ 33, 40. Because plaintiffs posture

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[8] Other jurisdictions also require employees to report suspected criminal conduct to law enforcement authorities for there to be a viable public policy wrongful discharge claim. See, e.g., Faust v. Ryder Commercial Leasing, 13 IER Cases (BNA) 226, 232 (Mo. App. 1997) (affirming dismissal of public policy wrongful discharge claim where the plaintiff reported the alleged criminal conduct to management, but not the public authorities, and hence no "clear mandate of public policy is effectuated").

themselves as whistleblowers of criminal conduct, their claim is directly governed by the rule of law stated in Fox v. MCI Communications.

Plaintiffs attempt to avoid the holding of Fox by citing to an earlier case and ignoring the fact that Fox states the law in Utah governing "whistleblowing" claims. They also try to obscure the holding in Fox by citing to comments made in dicta, and ignore the actual rule of law announced by the Supreme Court in Fox (quoted above). Pl. Opposition Memo. at 25-26.

Plaintiffs also attempt to escape the application of Fox by claiming that they were discharged not only for their threatened whistleblowing but also because they "refused to engage in illegal activities." Pl. Opposition Memo. at 27. Plaintiffs provide no evidentiary support whatsoever for this assertion. They do not identify any "illegal activities" they were supposedly requested to perform or any refusal on their part to engage in such activity. Id.

The reason for the groundlessness of plaintiffs' assertion is obvious: There was no illegal activity that plaintiffs were required to or even could have performed. Plaintiffs were "bulk loaders," responsible for loading sugar in rail cars. They had no responsibility to determine the purity of sugar, and did not certify or in any way validate the condition of sugar. They did not determine where the sugar was shipped or whether it was intended for human or animal consumption or any other use. They merely loaded rail cars with sugar and filled out bulk loading forms indicating that the cars were loaded and that the car openings were closed and sealed. Waddoups Depo. at 87-88; 135-137 and Ex. 21 thereto; Sparrow Depo. at 177-179; 183-184; 186-191 and Ex. 5-6 thereto.

In their depositions, plaintiffs did not testify that they were requested to engage in illegal activities, nor did they claim to have refused to perform illegal activities. Rather, they loaded rail cars and filled out the standard forms as normal bulk loaders. Sparrow testified:

> Q. [A]t any time after the Mike Davis accident did you bring up any concern you had about possible contaminated sugar?
>
> A. No.
>
> Q. You never brought it up to anyone?
>
> A. No.
>
> ***
>
> Q. [D]id you ever tell anyone at Amalgamated that you did not want to sign off on shipments of adulterated sugar?
>
> A. No.
>
> ***
>
> Q. So you never told anyone at Amalgamated Sugar that you didn't want to sign off on shipments of sugar because it had sugar contaminated from the Mike Davis accident?
>
> A. No.
>
> ***
>
> Q. Did you ever object to signing some form?
>
> A. No.
>
> ***

Q. Did you at any later date tell anyone at Amalgamated that you didn't want to sign some form?

A. No.

Q. So as you continued to work as a bulk loader, for each rail car you would get a [bulk loading] form like Exhibit 6, is that correct?

A. Yes.

Q. And you would fill it out as this one is filled out, is that correct?

A. Yes.

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Q. And then you would sign on the form that is Exhibit 6 on the line that says Final Inspection and Sealed, is that correct?

A. Yes. I would sign it and the foreman would sign it.

Q. Is there any occasion when you refused to sign it?

A. Refused, no.

Q. Was there any occasion in which you said to anyone you didn't want to sign it?

A. No.

Sparrow Depo. at 172, 249, 250, 256-58.

In sum, plaintiffs' "refusal to engage in illegal activity" argument is without any factual basis and, indeed, is contradicted by the record. Plaintiffs' public policy wrongful discharge claim rests solely on their contention that they threatened to "blow the whistle" on supposed

illegal activity. Therefore, if plaintiffs' public policy wrongful discharge claim were governed by Utah law (which it is not), it would fail to state a claim because plaintiffs did not report the alleged criminal activity to the public authorities.

VI. PLAINTIFFS' INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM IS GROUNDLESS.

A. Plaintiffs' Intentional Infliction of Emotional Distress Claim is Barred by the Idaho Workmen's Compensation Act.

Plaintiffs assert a claim for intentional infliction of emotion distress based on how they were supposedly treated on the job after the Mike Davis fatality. Complaint ¶¶ 47-50. In its opening memorandum, Amalgamated Sugar explained that plaintiffs' emotional distress claim is barred by the Idaho Workmen's Compensation Act.[9] Def. Opening Memo. at 12-13.

In response, plaintiffs cite just one case, Holmes v. Union Oil Co. of California, 760 P.2d 1189 (Idaho App. 1988), which does not have anything to do with the Idaho Workmen's Compensation Act or the application of its exclusive remedy provision. Holmes merely ruled that an intentional infliction of emotional distress claim asserted by a former employee based upon his discharge was "without merit" and properly dismissed at summary judgment because

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[9] Plaintiffs' infliction of emotional distress claims would also be barred by the exclusive remedy provision of the Utah Workers' Compensation Act. See, e.g., Bryan v. Utah Int'l, 533 P.2d 892, 893-94 (Utah 1975) (injured employee's tort claims against employer barred by Workers' Compensation Act, even though injuries were allegedly caused by supervisor's intentional harassing conduct); Lantz v. Nat'l Semiconductor Corp., 775 P.2d 937, 939-40 (Utah App. 1989) (affirming summary dismissal of tort claims against employer based upon injuries allegedly resulting from supervisor's conduct); Mounteer v. Utah Power & Light Co., 823 P.2d 1055, 1058-59 (Utah 1991) (affirming summary dismissal of intentional infliction of emotional distress claim as barred by the Utah Workers' Compensation Act).

the discharge was not "extreme and outrageous conduct" as required by the tort. 760 P.2d at 1197.

Plaintiffs next argue that because their emotional distress claim is based on alleged intentional harassment (not an unintentional accident), their claim can never be barred by the Idaho Workmen's Compensation Act. Pl. Opposition Memo. at 28. There is no merit to plaintiffs' argument. The statute expressly states that workers compensation is the exclusive remedy for job-related injuries except where an injury is "caused by the willful or unprovoked physical aggression." Idaho Code § 72-209(3) (emphasis added). The Idaho Supreme Court has made clear that the statute means what it says:

> [T]he Idaho worker's compensation law provides the exclusive remedy for injuries arising out of and in the course of employment. . . . If the employee is unable to prove that the injury was caused the willful or unprovoked physical aggression of the employer, the employee will not be entitled to damages.

Kearney v. Denker, 760 P.2d 1171, 1173 (Idaho 1988). Plaintiffs do not allege any severe emotional distress as a result of willful or unprovoked physical aggression, and therefore their claim is barred. Def. Opening Memo. at 13.

Moreover, the Idaho Supreme Court has expressly rejected plaintiffs' argument that an intentional tort claim should not be barred because alleged intentional misconduct is not an accident. The Court has repeatedly affirmed summary dismissal of intentional tort claims as barred by the Workmen's Compensation Act, as long as the claimed injuries do not result from "willful or unprovoked physical aggression." See, e.g., Yeend v. United Parcel Service, Inc., 659 P.2d 87, 88-90 (Idaho 1982) (affirming summary dismissal of intentional tort claims as barred by

the Idaho Workmen's Compensation Act, even though the plaintiff alleged that the defendant "intentionally and recklessly subjected the Plaintiff to severe emotional distress, pain and suffering," and rejecting dissent's suggestion that an intentional act may not come within the statutory definition of "accident"); Henderson v. State, 715 P.2d 978, 979 (Idaho 1986) (affirming summary dismissal of intentional tort claims asserted by discharged employee who alleged that he had been "harassed" and mistreated on the job, which treatment caused him mental and physical injuries. Despite the plaintiff's allegations of intentional misconduct, his tort claims were barred by the Workmen's Compensation Act because his injuries did not result from physical aggression); DeMoss v. City of Coeur D'Alene, 795 P.2d 875, 877 (Idaho 1990) (affirming summary dismissal of tort and "assault and battery" claims based on injuries allegedly resulting from supervisor's intentional conduct because there was no evidence of "unprovoked physical aggression").

In sum, plaintiffs' emotional distress claims are barred by the exclusive remedy provision of the Idaho Workmen's Compensation Act.

B. Plaintiffs' Emotional Distress Claims Are Preempted by Federal Labor Law.

In its Opening Memorandum, Amalgamated Sugar explained that the federal Labor Management Relations Act ("LMRA") preempts plaintiffs' emotional distress claims because plaintiffs' allegations about supposed supervisory harassment implicates the collective bargaining agreement (governing plaintiffs' employment and supervisory authority), which is exclusively governed by federal law. Def. Opening Memo. at 13-15. Courts have routinely

dismissed, on the basis of LMRA preemption, emotional distress claims based on alleged supervisory misconduct in unionized workplaces. See, e.g., Johnson v. Beatrice Foods Co., 921 F.2d 1015, 1017-18, 1020, 1022 (10th Cir. 1990) (affirming summary dismissal of infliction of emotional distress claim as preempted by LMRA where the plaintiff alleged that his supervisor harassed him, publicly ridiculed him, verbally abused him, and improperly disciplined him).

Federal labor law preempts tort claims whenever the claims "implicate the exercise of supervisory authority," that is, whenever the misconduct alleged is "misconduct under color of possible contractual authority." Only if the alleged misconduct is "purely personal" and "does not implicate the exercise of supervisory authority" can the claim escape being preempted by the LMRA. Retherford v. AT&T Communications, 844 P.2d 949, 971-72 (Utah 1992) (summarizing federal labor law preemption under LMRA). Infliction of emotional distress claims, in particular, are preempted for the additional reason that the issue of the outrageousness of the alleged conduct cannot be resolved without reference to the labor agreement:

> [A]ll aspects of [the plaintiff's] employment, including the terms of the C[ollective] B[argaining] A[greement], must be considered when evaluating whether [the employer's] conduct was outrageous.

Johnson, 921 F.2d at 1020 (citation omitted).

Plaintiffs attempt to escape federal labor law preemption by recharacterizing their emotional distress claim as involving only "personal" matters. Pl. Opposition Memo. at 31-33. In doing so, plaintiffs misstate the law and mischaracterize the facts on which they rely. For conduct to be "personal" so as to escape federal labor law preemption, it must be based on

conduct that is unrelated to employment and is personal to the particular individuals involved. For example, a tort claim based on a supervisor's "comments about the sexual activities of [the plaintiff's] wife" which "escalated into a fist fight" was held not preempted. Retherford, 844 P.2d at 972. Plaintiffs do not allege such personal conflicts.

Moreover, if the conduct at issue were truly personal so as to avoid federal labor law preemption, it would merely allow plaintiffs to assert claims against other persons in their individual capacity, not claims against the Company. Retherford, 844 P.2d at 972 (emotional distress claims against three co-workers not preempted because based on their personal behavior towards the plaintiff). In other words, if plaintiffs were to succeed in their "it was only a personal matter" argument, they would have no basis for their tort claim against Amalgamated Sugar.

The asserted factual basis for plaintiffs' emotional distress claim demonstrates that the claim is not personal in character. Plaintiffs allege that Amalgamated Sugar "offered counseling and gamma globulin shots after the [Mike Davis] accident to any employee who desired them, [but] failed to offer this help to Mr. Waddoups" (who was on a regularly scheduled 7-day break after the accident). Complaint ¶ 47; Waddoups Depo. at 134. The allegation is factually incorrect because Mr. Waddoups testified that the Company made two psychiatrists available at the factory on the day of the accident, and that he met with one of them. Waddoups Depo. at 217-18. In any case, the allegation does not concern any alleged "purely personal" dispute between Mr. Waddoups and any other individual, but describes how the company supposedly

responded to the accident. Plaintiffs also allege that Amalgamated Sugar "implied" that "Mr. Waddoups was responsible for the fatal accident" due to "Mr. Waddoups' control over the movement of the bulk-loading system." Complaint ¶ 47(a). Again, there is nothing in this allegation of a "purely personal" nature. It merely asserts a supposed management judgment about Mr. Waddoups' responsibility in light of the fact that he was in charge of the machinery that caused the accident.[10]

With respect to Mr. Sparrow, plaintiffs allege that a supervisor slapped him with a yellow notebook and threatened to terminate him for "messing up." Complaint ¶ 48(a); Sparrow Depo. at 98. This allegation clearly implicates the exercise of supervisory authority and therefore is preempted by federal labor law. Retherford, 844 P.2d at 972 (emotional distress claim based on supervisors' alleged "reprimand[ing]" the plaintiff and threatening that she would "lose her job" preempted by federal labor law because claim "raises questions about [the supervisors'] authority under the collective bargaining agreement"); Johnson, 921 F.2d at 1017-18 (emotional distress claim based on supervisor's alleged harassment, ridicule, and improper disciplining of the plaintiff preempted by federal labor law); Douglas v. American Info. Technologies Corp., 877 F.2d 565, 572-73 (7th Cir. 1989) (infliction of emotional distress claim based on employer's alleged "arbitrary," "unjustified," and "excessive" disciplinary actions towards the plaintiff preempted by federal labor law).

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[10] Plaintiffs allege that an unidentified John Doe "defendant" simulated a homosexual act with Mr. Waddoups. Complaint ¶ 47(b). Because this allegation involves an unidentified and unknown person (and not a manager, as opposing counsel asserts), it cannot be the basis of a valid claim against the Company.

In sum, plaintiffs' infliction of emotional distress claims are preempted by federal labor law.

C. Plaintiffs Cannot Establish Essential Elements of Their Emotional Distress Claim.

Plaintiffs fail to show that the alleged conduct was extreme, uncivilized and outrageous as required for their claim of intentional infliction of emotional distress. Def. Opening Memo. at 15. Plaintiffs cite no case law in support of their position, but merely ask rhetorical questions. Pl. Opposition Memo. at 34-35.

Equally important, plaintiffs cannot establish another required element of their claim – that they suffered severe, disabling emotional distress. Proof of "a severely disabling emotional condition" is an essential element of the cause of action, and not merely an aspect of damages:

> [E]vidence showing that the plaintiff was upset, embarrassed, angered, bothered and depressed did not demonstrate a severely disabling emotional condition adequate for intentional infliction of emotional distress damages.

Walston v. Monumental Life Ins. Co., 923 P.2d 456, 464-65 (Idaho 1996). Plaintiffs merely allege that Mr. Sparrow felt "bummed out" about being discharged,[11] and did not work for "about

---

[11] Plaintiffs' discharges are not part of their emotional distress claim (Complaint ¶¶ 47-50), and therefore it is irrelevant that Mr. Sparrow was "bummed out" by his discharge. Moreover, a discharge is not extreme and outrageous conduct actionable under the tort of intentional infliction of emotional distress. See, e.g., Holmes v. Union Oil Co. of California, 760 P.2d 1189, 1197 (Idaho App. 1988) (affirming summary dismissal of intentional infliction of emotional distress claim based on the plaintiff's discharge because discharge is not "extreme and outrageous conduct"); Sperber v. Gallagher Ash Co., 747 P.2d 1025, 1028-29 (Utah 1987) (discharge from employment, even when the employee is given a false reason for the action, "does not constitute outrageous or intolerable conduct by an employer." While "every employee who believes he has a legitimate grievance concerning his discharge from employment experiences some emotional anguish," such does not give rise to "a claim for intentional infliction of emotional distress")

a month." Pl. Opposition Memo. at 35-36. Both plaintiffs have worked regularly since leaving Amalgamated Sugar. Waddoups Depo. at 8-9; 11-20; Sparrow Depo. at 9-16. In short, plaintiffs have not suffered any "severely disabling" condition, and therefore their intentional infliction of emotional distress claim is groundless, and should be dismissed.

VII. PLAINTIFFS' INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE CLAIM IS GROUNDLESS.

In its opening memorandum, Amalgamated Sugar pointed out that plaintiffs' interference with prospective economic advantage claim is groundless because they do not identify, let alone substantiate, any conduct by Amalgamated Sugar that interfered with any actual or potential economic relationship between either plaintiff and any third party. Def. Opening Memo. at 16. Proof of such interfering conduct that disrupts an actual or potential economic relationship between a plaintiff and a specific third party is a required element of the cause of action. Idaho Nat'l Bank v. Bliss Valley Foods, 824 P.2d 841, 860-61 (Idaho 1991).

In response, opposing counsel misstates the record in order to claim that Mr. Sparrow was turned down for two jobs because of Amalgamated Sugar. Pl. Opposition Memo. at 37. Counsel's claim is contradicted by Mr. Sparrow's deposition testimony. The first job in question was at Amalgamated Sugar itself, specifically at its "beet dump" where sugar beets are stored for later use in the Company's factories. Sparrow Depo. at 17, 270. This alleged incident does not support plaintiffs' claim because a party to a contract (actual or potential) cannot tortiously interfere with it. Orstrander v. Farm Bureau Mut. Ins. Co., 851 P.2d 846, 850 (Idaho 1993).

The second job referred to was at Oreida Foods, about which Mr. Sparrow testified he does not know of any contact between Oreida Foods and Amalgamated Sugar regarding himself. Sparrow Depo. at 272-73. Moreover, Mr. Sparrow testified that Oreida Foods informed him that he was not being hired because "they weren't hiring" and "they had everybody they needed." Id. at 273-74. In sum, there is no support for opposing counsel's claims about Mr. Sparrow. With respect to Mr. Waddoups, counsel does not even claim that Amalgamated Sugar interfered with any potential employment or other opportunity. Pl. Opposition Memo. at 37.

Moreover, plaintiffs testified affirmatively that they are unaware of any contacts between Amalgamated Sugar and any of their subsequent actual or potential employers. Mr. Sparrow testified:

> Q. So you don't know of any communications between anyone at Amalgamated Sugar and any other employer regarding you, is that correct?
>
> A. Correct. (Sparrow Depo. at 276-77.)

Mr. Waddoups testified:

> Q. So as far as you know, Amalgamated Sugar has not been in contact with any of your employers since --
>
> A. As far as I know.
>
> Q. Do you know if Amalgamated Sugar has been in contact with any of the companies you applied at?
>
> A. I would not know that. (Waddoups Depo. at 310.)

In sum, there is no basis for plaintiffs' interference with prospective economic advantage claim.

VIII. CONCLUSION

For the reasons stated above and stated in Amalgamated Sugar's opening memorandum, plaintiffs' Complaint and all claims stated therein should be dismissed with prejudice.

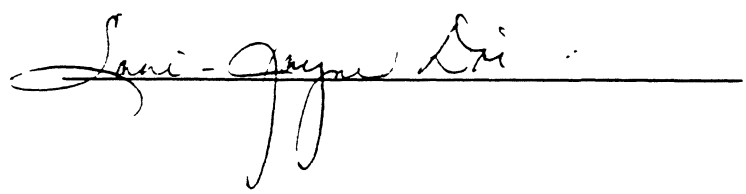
DATED this 2nd day of December, 1997.

W. MARK GAVRE
MARGARET NIVER MCGANN
PARSONS BEHLE & LATIMER
Attorneys for The Amalgamated Sugar Company

CERTIFICATE OF SERVICE

I hereby certify that on this 22 day of December, 1997, I caused to be hand-delivered a true and correct copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**, to:

Trent J. Waddoups
CARR & WADDOUPS
8 East Broadway, Suite 201
Salt Lake City, Utah 84111



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Tab F

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APR 9 1998

IN THE SECOND JUDICIAL DISTRICT COURT

IN AND FOR WEBER COUNTY, STATE OF UTAH

* * * * * * *

BLAKE WILLIAM WADDOUPS and JAMES EDWARD SPARROW, JR.,	)	Case No. 950900441
Plaintiffs,	)	Judge Stanton M. Taylor
vs.	)	**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**
THE AMALGAMATED SUGAR COMPANY, a Utah corporation, et al.,	)	
Defendant.	)	

* * * * * * *

This matter came on for hearing before the Court on Monday, March 23, 1998. Pending before the Court were defendant's Motion for Summary Judgment and plaintiff's Motion for a Continuance.

Defendant The Amalgamated Sugar Company was represented by W. Mark Gavre of Parsons Behle & Latimer. Plaintiffs Blake William Waddoups and James Edward Sparrow, Jr. were represented by Trent J. Waddoups of Carr & Waddoups.

Having considered the memoranda, affidavit, and exhibits filed by the parties and having heard oral argument from counsel, the Court hereby makes the following decision, based upon undisputed facts, and enters the following Order:

1. Plaintiffs' claims are governed by Idaho law, not Utah law. As the forum state, Utah applies the "most significant relationship" test of the Restatement (Second) of Conflict of Laws to determine the governing law in a given case. In the instant case, plaintiffs resided and worked in Idaho during all material times. Plaintiffs were discharged by Amalgamated Sugar in Idaho, and the alleged wrongful and injurious acts took place in Idaho. While Amalgamated Sugar's headquarters is in Utah, there is no evidence in the record of any conduct by Amalgamated Sugar in Utah related to plaintiffs. Accordingly, applying the "most significant relationship" test, the Court finds that Idaho law governs plaintiffs' claims.

2. Plaintiff's claim for wrongful discharge in violation of Utah public policy is dismissed with prejudice because, being based on Utah law, it fails to state a claim under Idaho law. Plaintiffs are hereby granted leave to file an amended complaint asserting a claim under Idaho law for wrongful discharge in violation of Idaho public policy.

3. Plaintiffs' claim for intentional and/or negligent infliction of emotional distress is dismissed with prejudice on the ground that it is preempted and therefore barred by the Labor Management Relations Act, 29 U.S.C. § 185(a). Plaintiffs were union members working for defendant at its Twin Falls, Idaho plant under a collective bargaining agreement between defendant and plaintiffs' union, The American Federation of Grain Millers Union. The collective bargaining agreement provided a grievance and arbitration process for handling disputes between

defendant and union-represented employees. Plaintiffs' allegations under this claim all concern supervisory conduct related to the operation or management of defendant's plant and hence concern the exercise of supervisory authority under the collective bargaining agreement. Plaintiffs' claim for intentional and/or negligent infliction of emotional distress is also dismissed on the ground that there is no evidence that either plaintiff suffered a severe or disabling emotional condition as a result of alleged conduct by defendant, as required by Idaho law.

4. Plaintiffs' claim for interference with prospective economic advantage is dismissed with prejudice because there is no evidence of conduct by defendant interfering with any actual or potential contract, employment relationship, or other economic relationship between either plaintiff and any other person.

5. Plaintiffs' claim for civil conspiracy is dismissed with prejudice because there is no evidence of defendant conspiring or interacting with any other person regarding plaintiffs.

Based upon the foregoing and good cause appearing therefor, IT IS HEREBY ORDERED that defendant's Motion for Summary Judgment is granted, ~~plaintiffs' Complaint, and all causes of action and claims contained therein, is hereby dismissed with~~ prejudice, and plaintiffs are granted leave to file an amended complaint asserting a claim under Idaho law for wrongful discharge in violation of Idaho public policy.

DATED this 7th day of ~~March~~ April, 1998.

BY THE COURT:

STANTON M. TAYLOR
Second District Court Judge

APPROVED AS TO FORM:

Trent J. Waddoups

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of March, 1998, I caused to be hand-delivered a true and correct copy of the foregoing **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**, to:

Trent J. Waddoups
CARR & WADDOUPS
8 East Broadway, Suite 201
Salt Lake City, Utah 84111

Tab G

IN THE SECOND JUDICIAL DISTRICT COURT

WEBER COUNTY, STATE OF UTAH

BLAKE WILLIAM WADDOUPS, and JAMES EDWARD SPARROW JR., Plaintiffs, vs. THE AMALGAMATED SUGAR COMPANY, a Utah corporation, et al., Defendants.	AUG 18 RULING Case No. 950900441

Plaintiffs move the court for a new trial or to alter or amend its judgment under rule 59 of the Utah Rules of Civil Procedure. In reviewing the motion and the relevant issues plaintiff raises, the court finds nothing raised that changes its decision. The motion is accordingly denied.

In addition, the court finds that its order granting summary judgment complies with rule 52(a) of the Utah Rules of Civil Procedure with the exception of the motion for a continuance. The motion was impliedly denied by granting defendant's motion for summary judgment, however, no brief written statement of the ground for its decision was given. The court now explicitly denies the motion for a continuance. Because the plaintiffs did not demonstrate how additional time would enable them to rebut the motion for summary judgment, plaintiff's motion for a continuance was denied. Plaintiffs have also had sufficient time, opportunity, and cooperation in conducting their discovery.

Dated this 12 day of August, 1998.

Stanton M. Taylor, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 18th day of August, 1998, I sent a true and correct copy of the foregoing ruling to counsel as follows:

Trent J. Waddoups
CARR & WADDOUPS
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Salt Lake City, Utah 84111

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MK Dixon
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Tab H

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IN THE SECOND JUDICIAL DISTRICT COURT

IN AND FOR WEBER COUNTY, STATE OF UTAH

* * * * * * *

BLAKE WILLIAM WADDOUPS and JAMES EDWARD SPARROW, JR.,	)	Case No. 950900441
Plaintiffs,	)	Judge Stanton M. Taylor
vs.	)	
THE AMALGAMATED SUGAR COMPANY, a Utah corporation, et al.,	)	**MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT**
Defendant.	)	

* * * * * * *

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STATE CASES

I. INTRODUCTION

On April 7, 1998 the Court issued an order granting summary judgment in favor of The Amalgamated Sugar Company ("Amalgamated Sugar" or the "Company"). The Court dismissed with prejudice plaintiffs' claims for (a) wrongful discharge in violation of Utah public policy, (b) intentional and/or negligent inflection of emotional distress, (c) interference with prospective economic advantage, and (d) civil conspiracy. Plaintiffs were granted leave to file an amended complaint asserting a claim under Idaho law for wrongful discharge in violation of Idaho public policy. See Order Granting Defendant's Motion for Summary Judgment at 2-3.

Plaintiffs have now filed their Amended Complaint, which reasserts all the claims that the Court already dismissed with prejudice, and also asserts a claim for wrongful discharge in violation of Idaho public policy. The dismissed claims will not be addressed in this memorandum because plaintiffs cannot reassert these claims, especially in light of the fact that the Court has already denied plaintiffs' motion to revive the claims.[1]

Plaintiffs' one remaining claim — wrongful discharge in violation of Idaho public policy — should be dismissed with prejudice because (a) it fails to state a claim under Idaho law, and (b) the claim is barred under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a).

---

[1] On April 17, 1998, plaintiffs filed a Motion for a New Trial or to Alter or Amend Judgment in which they attempted to persuade the Court to reverse its order granting summary judgment. On August 12, 1998, the Court issued its Ruling denying plaintiffs' motion.

Plaintiffs are former union-represented employees of Amalgamated Sugar who worked in Twin Falls, Idaho. Plaintiffs' employment was governed by a collective bargaining agreement between their union and Amalgamated Sugar. The collective bargaining agreement contained a "just cause" standard for termination, and also provided a grievance and arbitration process for resolving work-related disputes, including discharges. On May 22 and 28, 1995, plaintiffs were separately discharged by the Company for excessive absenteeism. Specifically, they each had more than three unexcused absences, the maximum allowed by Company policy. Although plaintiffs claim that they were discharged "without just cause," they did not contest their discharges or attempt to use the grievance and arbitration process that was available to them.

Now plaintiffs claim that they were potential "whistleblowers," who were supposedly discharged for threatening to publicize the Company's alleged criminal shipping of contaminated sugar. On this basis, they claim that they were wrongfully discharged in violation of Idaho public policy. There is no legal merit or factual basis to plaintiffs' claim.

Idaho law recognizes a "public policy wrongful discharge" claim as a breach of implied-in-law contract claim in the context of at-will employment. Plaintiffs fail to state a claim under Idaho law because (a) Idaho law does not recognize a public policy wrongful discharge claim where employees are employed under a collective bargaining agreement with a "just cause" standard for termination, and (b) as supposed "whistleblowers," plaintiffs never "blew the whistle," i.e., they never reported the alleged wrongdoing at Amalgamated Sugar to any public authority. Idaho law

does not recognize a public policy "whistleblower" claim except where the employee-plaintiff reports the alleged wrongdoing to an appropriate governmental entity.

Additionally, plaintiffs' "public policy" claim is barred under the Labor Management Relations Act. Plaintiffs' employment contract with Amalgamated Sugar was the collective bargaining agreement that governed their employment. Collective bargaining agreements (including all related claims whether pled in tort or contract) are governed exclusively by federal labor law. Consequently, plaintiffs' claim, an implied contract claim, is barred because it is based on plaintiffs' actual employment contract, the collective bargaining agreement, and plaintiffs failed to timely exercise their rights under the collective bargaining agreement. Alternatively, if plaintiffs' claim is construed as asserting separate implied right distinct from the collective bargaining agreement, it is barred because such claims are not permitted by federal labor law.

II. STATEMENT OF FACTS

Plaintiffs' Employment

1. Amalgamated Sugar hired Blake Waddoups ("Waddoups") in 1985 and James Sparrow ("Sparrow") in 1989 to work at the Company's sugar manufacturing facility in Twin Falls, Idaho. Amended Complaint ¶¶ 8, 10.

2. "Plaintiffs, Mr. Waddoups and Mr. Sparrow, at all times material hereto worked and resided in the County of Twin Falls, State of Idaho." Amended Complaint ¶ 7.

3. Plaintiffs' employment with Amalgamated Sugar was governed by a collective bargaining agreement between The American Federation of Grain Millers Union ("the Union")

and the Company, and both plaintiffs were members of the Union. Plaintiffs received copies of the collective bargaining agreement. Deposition of James E. Sparrow, Jr. at 28-29 (hereinafter "Sparrow Depo. at __"); Deposition of Blake William Waddoups at 95-96 (hereinafter "Waddoups Depo. at __").

4. Under the collective bargaining agreement, employees may be discharged only for "just cause," and a discharged employee may file a grievance if he believes that his discharge was not justified. The grievance process culminates in binding arbitration. The collective bargaining agreement states:

> The Company has the right to discipline or discharge employees for just cause. . . . An employee who believes his discipline or discharge is not justified shall have recourse to the grievance procedure under the Agreement. . . . An employee claiming a grievance shall put his grievance in writing to his Steward within five (5) scheduled working days of the Employee's knowledge of the occurrence to be grieved . . . Time is of the essence and all grievances must be handled within the prescribed time limits set forth herein. Failure to do so shall constitute forfeitures of the written grievance by either party failing to do so. . . . If a grievance is to be carried to arbitration, . . . [the arbitrator's] decision shall be final and binding on all parties involved.

Ex. 4, at pp. 4-5, to Sparrow Depo.; Ex. 9, at pp. 4-5, to Waddoups Depo.

5. Plaintiffs' employment was subject to the rule that "The maximum number of unexcused absences you can receive before being terminated is three (3)." Ex. 3 to Sparrow Depo. Plaintiffs were familiar with this rule. Sparrow testified:

> Q. Do you recall being informed of the rule that you could have no more than three unexcused absences?

A. Yes.

Q. When do you recall being informed of that rule?

A. All the time.

***

A. [P]eople were always talking about it, you know, foremen, supervisors.

Sparrow Depo. at 27-28.

Sparrow's Unexcused Absences

6. Sparrow had unexcused absences on September 10, 1994 and March 24, 1995. Sparrow Depo. at 201-03 and Ex. 7, at pp. 1-2, thereto.

7. On May 20, 1995, Sparrow did not report to work, but called in sick. Sparrow explained:

A. I just -- it was just nerves in my stomach. I just felt really queasy and I just didn't feel like going to work mostly. It was just the place had gotten to me and I just didn't feel like being there.

Q. So you called in sick?

A. Yes.

Sparrow Depo. at 210 (emphasis added).

8. On the afternoon of the same day, Sparrow drove to Nevada and was caught speeding. Because he had an outstanding warrant for a prior unpaid speeding ticket, Sparrow was arrested and not released from jail until May 25, 1995. Sparrow missed four days of work, May 20, 21, 23, and 24, 1995. Sparrow Depo. at 211-16.

9. Sparrow knew that his absences were unexcused and that he had exceeded the maximum number permitted. When he returned to Twin Falls, Sparrow telephoned his foreman and asked him if he was fired:

> Q. Why did you ask him if you were fired?
>
> A. Because I spent three days in jail and I should have worked. I work Friday. I missed three days of work. That's unexcused. Plus I knew I had one before and that's four, and I knew I could be terminated for that.
>
> Q. You knew you could be terminated for unexcused absences and you had enough to be terminated?
>
> A. Yeah.
>
> ***
>
> Q. Was there any question in your mind that being absent from work because you're in jail is an unexcused absence?
>
> A. I have always believed before that it was.
>
> Q. [You] always believed that it was an unexcused absence?
>
> A. Yes.
>
> Q. So by the time you got back to work on the 25th and your shift was finished you had four unexcused absences; is that correct?
>
> A. Correct.

Sparrow Depo. at 217, 222.

10. Sparrow was discharged on May 22, 1995 by Assistant Superintendent Bill Stuart for having more than three unexcused absences. Sparrow Depo. at 219.

11. Sparrow alleges that he was discharged "without just cause" and without being given an "opportunity to respond or be heard on the purported basis [of his discharge] that he had abused his sick leave." Amended Complaint ¶¶ 39, 37.

12. Sparrow did not file a grievance under the collective bargaining agreement regarding his discharge. Sparrow testified:

> Q. Did you know that an employee who is discharged who does not think it's fair or justified can have a grievance filed?
>
> A. Yes.
>
> Q. You knew you could file a grievance upon being discharged?
>
> A. Yes.
>
> Q. And did you know that there was a grievance procedure?
>
> A. Yes.
>
> ***
>
> Q. And did you know that . . . there was at the end of the process an arbitration procedure?
>
> A. Yes.
>
> Q. And did you know these things in May 1995 when you were discharged?
>
> A. Yes.
>
> ***
>
> Q. When you got fired did you file a grievance with the union?
>
> A. No.

Sparrow Depo. at 43-44, 175.

Waddoups' Unexcused Absences

13. On October 10, 1986, Waddoups received a written warning for excessive absenteeism because of the large number of sick leave days he had taken. He was told that he would need medical verification for any future sick leave absences. He was also warned: "If excessive absenteeism continues you will be discharged." Ex. 10 to Waddoups Depo.

14. Waddoups had an unexcused absence on March 19, 1988. Waddoups Depo. at 113 and Ex. 12 thereto.

15. On September 28, 1993, Waddoups was verbally warned about his poor attendance. Waddoups Depo. at 118-19 and Ex. 15 thereto.

16. On December 28, 1993, Waddoups received another written warning about his attendance, and he was again required to have medical verification for sick leave absences. Ex. 17 to Waddoups Depo.

17. On June 29, 1994, Waddoups had an unexcused absence. Waddoups Depo. at 123 and Ex. 18 thereto.

18. On March 3, 1995, Waddoups had an unexcused absence. Waddoups Depo. at 243 and Ex. 23 thereto.

19. On May 28, 1995, Waddoups did not report to work. At 10:00 a.m., four hours after his work shift had begun, Waddoups called in saying he was sick. Waddoups then spoke to Assistant Superintendent Larry Dayley, and gave him a different explanation: "I told him that I

had personal problems. I didn't know why the alarm didn't go off, but I had over slept. I had called in sick because I wasn't feeling well." Waddoups Depo. at 258, 260-61 and Ex. 26 thereto.

20. Assistant Superintendent Larry Dayley terminated Waddoups for excessive absenteeism. Waddoups Depo. at 22-23 and Ex. 2, at p.1, thereto.

21. In his application for unemployment benefits, Waddoups admitted that he had been warned "2-3 times" that his absence rate was reaching unacceptable levels. Waddoups Depo. at 31 and Ex. 2, at p. 2, thereto.

22. Waddoups alleges that he was discharged "without just cause" and without being given an "opportunity to respond or be heard on the purported basis [of his discharge] that he had been tardy too often." Amended Complaint ¶¶ 39, 35.

23. Waddoups did not file a grievance under the collective bargaining agreement regarding his discharge although he was aware of the grievance process. Waddoups Depo. at 98, 107.

Plaintiffs' Whistleblowing Allegation

24. On February 16, 1995, there was an accident at Amalgamated Sugar's Twin Falls facility in which employee Mike Davis was killed. The facility was shut down and cleaned for three days after the accident. Sugar that was being loaded on the day of the accident was subsequently shipped to an animal feed producer. Complaint ¶¶ 15, 22; Sparrow Depo. at 64, 126-27.

25. Plaintiffs claim that sugar stored at the Twin Falls facility was contaminated by the fatal accident, and was subsequently shipped to customers for human consumption, a criminal violation of the federal Food, Drug and Cosmetics Act. Complaint ¶ 44; Sparrow Depo. at 46-7.

26. Plaintiffs claim that they "threaten[ed] to expose the [Company's] illegal activity" of shipping supposedly contaminated sugar. Complaint ¶ 40. However, neither plaintiff ever contacted the Food and Drug Administration, any federal authority, any state authority, or the media about the Company's supposed shipping of contaminated sugar. Sparrow Depo. at 173-74; Waddoups Depo. at 65; Complaint ¶¶ 23-44.

27. Sparrow testified that he never raised with anyone the issue of supposedly contaminated sugar being shipped:

> Q. [A]t any time after the Mike Davis accident, did you bring up any concern you had about possibly contaminated sugar?
>
> A. No.
>
> Q. You never brought it up to anyone?
>
> A. No.
>
> ***
>
> Q. So with respect to Mike Davis's death, did you raise any issue of contamination with anyone?
>
> A. No.

Sparrow Depo. at 172, 173-74.

28. On May 31, 1995, after they had been discharged, plaintiffs returned to Amalgamated Sugar's Twin Falls facility to pick up their personal belongings. Waddoups got into an argument with plant manager Vic Jaro about supposed sugar contamination. Sparrow Depo. at 145-47. Waddoups testified:

> Q. Were you saying you were thinking of going to the news or to the FDA?
>
> A. I never said that.

Waddoups Depo. at 65.

ARGUMENT

III. PLAINTIFFS FAIL TO STATE A CLAIM FOR PUBLIC POLICY WRONGFUL DISCHARGE UNDER IDAHO LAW

A. Idaho Law on Public Policy Wrongful Discharge.

Idaho law recognizes a public policy wrongful discharge claim only as (a) contract claim (b) based on an implied-in-law restriction that limits an employer's otherwise unfettered right to discharge an individual employed under an at-will employment contract.

> [T]his Court [declares its] intent to classify a cause of action for wrongful termination in violation of public policy as a breach of contract rather than a tort. All employment contracts terminable at will are subject to the covenant of good faith and fair dealing. A breach of the covenant is a breach of the employment contract, and is not a tort. The potential recovery results in contract damages, not tort damages. Similarly, a cause of action for wrongful termination of a contract of employment at will based on a violation of public policy is a contract cause of action which results in contract damages.

Hummer v. Evans, 923 P.2d 981, 987 (Idaho 1996) (citations and internal quotations marks omitted; emphasis added).

The Idaho Supreme Court has expressly followed the New Hampshire Supreme Court in recognizing a public policy wrongful discharge claim as a contract claim that applies to at-will employment contracts.

> We hold that a termination by an employer of a contract of employment at will which [violates public policy] constitutes a breach of the employment contract.

Jackson v. Minidoka Irrigation District, 563 P.2d 54, 58 (Idaho 1977) (quoting Monge v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1974). See also Hummer, 923 P.2d at 987 (citing Monge on same point).

It is because an at-will employment contract gives the employer complete freedom to discharge an employee for any reason that the Idaho Supreme Court has recognized an implied contractual restriction on the employer's freedom of action where a termination would violate public policy. See Hummer, 923 P.2d at 986-87 (employer may terminate at-will employment contract for any reason without incurring liability unless termination violates public policy); Ostrander v. Farm Bureau Mutual Ins. Co., 851 P.2d 946, 949 (Idaho 1993) (Idaho law recognizes "an exception to employment-at-will contracts where a discharge is for a reason contravening public policy."); Staggie v. Idaho Falls Consolidated Hospitals, Inc., 715 P.2d 1019, 1021-22 (Idaho App. 1986) ("either the employer or the employee may terminate [an at-

will] employment agreement at any time without liability, except that the employer may not discharge the employee for a reason contravening public policy").

Where the employer does not have unfettered freedom to discharge an employee and hence the freedom to violate public policy, the need for an implied-in-law contractual restriction (to protect public policy) is absent. The Idaho Supreme Court has not ruled on a claim of public policy wrongful discharge in the context of a collective bargaining agreement containing a "just cause" standard for termination. Nonetheless, it is reasonable to conclude that the Supreme Court would not recognize a public policy claim where a "just cause" contract term already prohibits the employer from terminating an employee in contravention of public policy. See, e.g., Laramee v. French & Bean Co., 830 F. Supp. 803, 806 (D. Vt. 1993) (at-will employees protected from terminations that violate public policy. "That protection however is not provided to employees whose discharge is contractually protected by a just cause provision of a collective bargaining agreement.")

In sum, a public policy wrongful discharge claim under Idaho law is a contract claim based on a contractual restriction that by operation of law is implied into the underlying at-will employment contract. Idaho has not recognized a public policy wrongful discharge claim outside the context of at-will employment.

B. Plaintiffs Fail to State a Public Policy Wrongful Discharge Claim Because Their Employment Contract Protected Them From Discharge Except for "Just Cause."

The collective bargaining agreement that governed plaintiffs' employment with Amalgamated Sugar prohibited the Company from terminating employees except where there was "just cause" for termination:

> The Company has the right to discipline or discharge employees for just cause.

Facts ¶ 4. If an employee did not believe that there was "just cause" for his discipline or discharge, the employee could file a grievance and, with the support of the Union, take the matter to binding arbitration. Id. While, plaintiffs claim that they were discharged "without just cause," they did not attempt to use the grievance and arbitration process. Id. ¶¶ 11, 12, 22, 23.

On the facts of this case, plaintiffs cannot state a claim under Idaho law for public policy wrongful discharge. As explained above, Idaho has recognized the cause of action only in the context of at-will employment, where the employee has no contractual protection from being wrongfully discharged. Plaintiffs in the instant case were fully protected from being wrongfully discharged. Not only did their employment contract contain a substantive "just cause" standard for discharge, it also provided a grievance and arbitration procedure for resolving the merits of disputed discharges. Facts ¶ 4. In light of these contractual provisions, the rationale for implying an additional contractual restriction into the employment contract has no application. Moreover, if plaintiffs were to be allowed to assert a public policy wrongful discharge claim it would mean that they could ignore their actual employment contract and the remedies it

provides, and yet assert in court a contract claim based on a dispute (termination of employment) expressly covered by plaintiffs' own employment contract. There is no support in Idaho law for what plaintiffs are attempting to do, and their claim should be dismissed with prejudice.

C. Plaintiffs Fail to State a Public Policy "Whistleblower" Claim Because They Never Reported the Alleged Wrongdoing to Public Authorities.

Plaintiffs assert their public policy wrongful discharge claim on the ground that they were potential "whistleblowers." Facts ¶ 26. However, plaintiffs never reported to any public authority, state or federal, the criminal conduct (supposed shipment of contaminated sugar) they now allege. Id. Indeed, Sparrow never raised the issue with anyone at the Company or elsewhere (id. ¶ 27), and Waddoups mentioned the issue at the Company only obliquely. Id. ¶ 28.

Idaho has recognized a "whistleblower" public policy wrongful discharge claim only where the plaintiff-employee actually reported the alleged wrongdoing to the appropriate public agency. See Ray v. Nampa School District No. 131, 814 P.2d 17, 21 (Idaho 1991) (public policy wrongful discharge claim stated by at-will employee where his "employment was terminated because he had reported certain safety code violations to the state electrical engineer"). Idaho has not recognized a "whistleblower" claim where the employee failed to report the alleged wrongdoing to a governmental agency or raised the issue only internally within the company.

Courts generally have refused to recognize "whistleblower" claims where the employee did not report the alleged wrongdoing to a public authority. This is especially true where, as here, criminal conduct by the employer is alleged. Only where the alleged wrongful conduct is

reported to a public authority is there the requisite "public" dimension to the employee's conduct necessary to sustain a "public policy" claim. An employee who reports wrongful or criminal conduct to his employer is engaged only in private conduct. See, e.g., Fox v. MCI Communications Corp., 931 P.2d 857, 861 (Utah 1997) ("[I]f an employee reports a criminal violation to an employer, rather than to public authorities, and is fired for making such reports, that does not, in our view, contravene a clear and substantial public policy." summary dismissal of public policy claim affirmed); Schlang v. Key Airlines, Inc., 794 F. Supp. 1493, 1504 (D. Nev. 1992) ("[A] complaint registered with the employer is a private or proprietary action that is not entitled to public policy protection."); Wiltsie v. Baby Grand Corp., 774 P.2d 432, 433 (Nev. 1989) ("Because appellant chose to report the [alleged illegal] activity to his supervisor rather than the appropriate authorities, he was merely acting in a private or proprietary manner." summary dismissal of public policy wrongful discharge claim upheld); Zaniecki v. P.A. Bergner & Co., 493 N.E. 2d 419, 421-22 (Ill. App. 1986) (Reporting illegal activity to a supervisor is a purely private action because "the critical element of public authority involvement is lacking.").

In sum, because plaintiffs did not report the alleged criminal conduct to any public authority, plaintiffs fail to state a "whistleblower" public policy wrongful discharge claim.

IV. PLAINTIFFS' PUBLIC POLICY CLAIM IS BARRED UNDER FEDERAL LABOR LAW

A. Federal Law Governing Collective Bargaining Agreements.

Claims relating to a collective bargaining agreement are governed exclusively by federal labor law under § 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a).[2] Such claims "must be brought under § 301 and be resolved by reference to federal law." Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 210 (1985). See also Textile Workers Union of American v. Lincoln Mills of Alabama, 353 U.S. 448, 451 (1957) (§ 301 vests exclusive power in "federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements."); Sperber v. Galigher Ash Co., 747 P.2d 1025, 1027 (Utah 1987) (summarizing federal labor law).

There are two prerequisites that must be satisfied before a breach of a collective bargaining agreement claim (or related claim) can be brought. First, the plaintiff-employee must exhaust or attempt to exhaust his grievance and arbitration remedies under the collective bargaining agreement. See Del Costello v. International Brotherhood of Teamsters, 462 U.S. 151, 163 (1983) ("an employee is required to attempt to exhaust any grievance or arbitration remedies provided in the collective-bargaining agreement."); Sperber, 747 P.2d at 1027 ("Under federal law, an employee is required to exhaust the grievance and arbitration remedies provided

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[2] Section 301 states in relevant part: "Suits for violation of contracts between an employer and a labor organization representing employees . . . may be brought in any district court of the United States having jurisdiction of the

(Footnote Continued on Next Page)

in the collective bargaining agreement between his union and his employer."): Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965).

Second, the plaintiff-employee must allege and prove that his union, as his agent and representative, breached its duty of fair representation to him by its conduct under the collective bargaining agreement. Del Costello, 462 U.S. at 165 ("To prevail against . . . the Company . . . [employee-plaintiffs] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union.") (internal quotation marks omitted; bracketed words in original). The reason for this "breach of duty of fair representation" prerequisite is that the collective bargaining agreement already provides union employees with a remedy and a procedure for obtaining the remedy, and therefore an employee may not go beyond the grievance and arbitration procedure (by suing in court) unless he can demonstrate that his union made a sham of his contractual remedies.

> Unless an employee proves that he has not been fairly represented by his union under the collective bargaining agreement, the grievance and arbitration procedures set forth in the collective bargaining agreement are the employee's exclusive remedy.

Sperber, 747 P.2d at 1027. See also Del Costello, 462 U.S. at 165 (breach of union's duty of fair representation must be proven because lawsuit constitutes "a direct challenge to the private

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parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 29 U.S.C. § 185(a) (1947).

settlement of disputes under the collective-bargaining agreement") (internal quotation marks omitted).

Section 301 of the Labor Management Relations Act not only exclusively governs claims for breach of collective bargaining agreements, it also preempts and therefore bars state-law claims that relate to collective bargaining agreements. The justification for § 301 preemption is the ease with which an aggrieved employee otherwise could turn a breach of a collective bargaining agreement into a state tort or contract claim, thereby possibly obtaining a state law remedy inconsistent with the collective bargaining agreement. Allis-Chalmers Corp., 471 U.S. at 209-11 ("the preemptive effect of § 301 must extend beyond suits alleging [collective bargaining agreement] violations" to encompass state-law claims that "would frustrate the federal labor-contract scheme established in § 301").

Under Section 301, a broad range of state-law claims are regularly dismissed as preempted by federal labor law. See, e.g., Steelworkers v. Rawson, 495 U.S. 362, 370-72 (1990) (wrongful death claim under Idaho law against union, based on union's alleged negligence in conducting safety inspections, preempted by § 301 despite fact that Idaho Supreme Court ruled that union's duty to reasonably conduct safety inspections had an independent basis in state law unrelated to the collective bargaining agreement); Park City Education Ass'n v. Board of Education, 879 P.2d 267, 273 (Utah App. 1994) (dismissal of contract claims upheld as barred by federal labor law); Rissetto v. Plumbers & Steamfitters Local 343, 94 F.3d 597, 599 (9th Cir. 1996) (discharged employee's breach of contract and breach of implied covenant claims

preempted by § 301); Mock v. T.G.&Y. Stores Co., 971 F.2d 522 (10th Cir. 1992) (emotional distress claim preempted by § 301); Jackson v. Southern California Gas Co., 881 F.2d 638, 644-45 (9th Cir. 1989) (implied covenant claim preempted by collective bargaining agreement containing terms governing grounds for discharge); Herman v. Carpenters Local 971, 60 F.3d 1375, 1385 (9th Cir. 1995) (affirming summary dismissal of implied covenant claim where collective bargaining agreement prohibited terminations without just cause). Because of the expansive scope of § 301 preemption, barred state-law claims are either dismissed or may be reconsidered as if they were pled under § 301. In the latter case, the claim would have to satisfy all requirements for a § 310 claim. Sperber, 747 P.2d at 1027-28 (preempted state-law contract claim reconsidered as if it were a § 301 claim, and then dismissed under § 301).

B. Because Plaintiffs' Claim Is Based on Their Collective Bargaining Agreement, the Claim Is Barred Under Federal Labor Law

As explained above, plaintiffs' public policy wrongful discharge claim is an implied contract claim (analogous to an implied covenant claim) based upon plaintiffs' underlying employment contract. See Section IIIA above. As also explained above, Idaho has not recognized a public policy wrongful discharge claim except on the basis of an at-will employment contract. Id. Nonetheless, if it is assumed for purposes of discussion that Idaho might recognize plaintiffs' claim in the context of their collective bargaining agreement, the claim would be barred under federal labor law. This is so because plaintiffs' claim asserts a contractual restriction that is implied in plaintiffs' underlying contract, the collective bargaining

agreement. Plaintiffs' claim is thus a claim concerning the collective bargaining agreement.[3] Accordingly, plaintiffs' claim must comply with the requirements of § 301.

Plaintiffs cannot satisfy any of the prerequisites to a valid claim under § 301. First, plaintiffs did not file a grievance or attempt to use their contractual remedies under the collective bargaining agreement. Facts ¶¶ 12, 23. Second, plaintiffs do not allege, let alone attempt to prove, that their union breached its duty of fair representation to them. Accordingly, plaintiffs' claim is barred under § 301 of the Labor Management Relations Act.

C. If Plaintiffs' Claim Were Characterized as Separate from the Collective Bargaining Agreement, It Would Still Be Barred by Federal Labor Law.

As an implied contract claim, plaintiffs' state-law claim is clearly dependent on their collective bargaining agreement. However, if plaintiffs were to try to characterize their claim as separate from the collective bargaining agreement, the claim would still be barred by § 301. This is so because the Labor Management Relations Act does not permit a separate contract (express

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[3] A collective bargaining agreement is not limited to the four corners of the written contract, but encompasses additional matters by implication United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-82 (1960) (terms of collective bargaining agreement "not confined to the express provisions of the contract"); Eitmann v. New Orleans Public Service, Inc., 730 F.2d 359, 363 (9th Cir. 1984) (company conduct "not explicitly covered by the collective bargaining agreement is properly within the scope of the contractual grievance procedure"). Consequently, an implied contract claim, like an implied covenant claim, is based on the collective bargaining agreement itself because it is based on a provision that is implied into the labor agreement. Rissetto, 94 F.2d at 599 ("claim for breach of covenant of good faith and fair dealing is also clearly preempted because such covenant is an implied term of [the plaintiff's] CBA").

The dependence of plaintiffs' claim on their collective bargaining agreement is confirmed by the fact that they allege that they were discharged "without just cause" and without an "opportunity to respond or be heard" on the reasons for their discharges. Facts ¶¶ 11, 22 Both the "just cause" standard for discharge and the "opportunity to respond or be heard" on the reason for a discharge are provided by the collective bargaining agreement and its grievance and arbitration process

or implied) to coexist with a collective bargaining agreement where the purported contract would be inconsistent with or more advantageous than the collective bargaining agreement. See, e.g., Chmiel v. Beverly Wilshire Hotel Co., 873 F.2d 1283, 1285 (9th Cir. 1989) ("Section 301 preempts any individual labor contract inconsistent with a collective bargaining agreement").

An implied contract claim is inconsistent with the collective bargaining agreement if it does not require the employee to use and exhaust the grievance and arbitration remedies or if it can be brought after a claim could be asserted under the collective bargaining agreement. Eitmann v. New Orleans Public Service, Inc., 730 F.2d 359, 362 (9th Cir. 1984) (implied contract claim preempted as inconsistent with collective bargaining agreement where it would "supersede" the "contractual grievance procedure" in the collective bargaining agreement and allow employee to assert claim without exhausting contractual remedies).

Federal labor law does not permit inconsistent claims, such as asserted by plaintiffs, because to do so would undermine the role of labor unions as representatives of unionized employees and would also undermine the collective bargaining process. The Utah Supreme Court has explained this point in detail:

> Under federal labor law, only duly authorized union representatives can bargain for the terms and conditions of employment for those within the bargaining unit. . . . [Any] separate contract must be consistent with the collective bargaining agreement negotiated by the union. Thus, inconsistent separate agreements are not enforceable. . . . Nothing could undermine the authority of the collective bargaining unit more thoroughly than allowing individuals or cohorts of employees to enforce separate contracts that were more advantageous to those employees than was the collective bargaining agreement itself. . . . Accordingly,

> we decline to [allow] individual agreements to undercut the union as the bargaining agent. In the instant case, providing any remedy under an implied contract when no remedy is available under the collective bargaining agreement -- because the time for arbitration has passed -- obviously would put [the plaintiff] in a more advantageous position than [union] employees bound by the collective bargaining agreement, thereby undermining the collective bargaining unit. Consequently, [the plaintiff's] alleged implied contract is unenforceable.

Retherford v. AT&T Communications, 844 P.2d 949, 970 (Utah 1992) (citations omitted; emphasis added).

In the instant case, plaintiffs' purported implied contract claim (if treated as separate from the collective bargaining agreement) would be inconsistent with the collective bargaining agreement governing plaintiffs' employment. Specifically, plaintiffs' claim would permit them to ignore the grievance and arbitration process and would also permit them to bring a lawsuit well beyond the time in which a claim could be asserted under the collective bargaining agreement. Accordingly, plaintiffs' state-law claim is barred under § 301 of the Labor Management Relations Act.

V. CONCLUSION

For the foregoing reasons, plaintiffs' public policy wrongful discharge claim based on Idaho law should be dismissed with prejudice.

DATED this 4th day of January, 1999.

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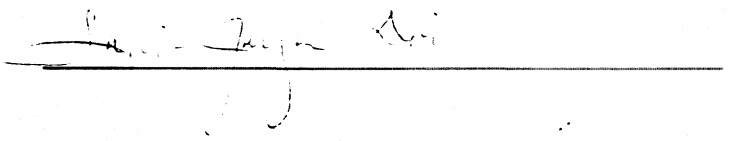
Attorneys for The Amalgamated Sugar Company

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of January, 1999, I caused to be hand-delivered a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT**, to:

Trent J. Waddoups
CARR & WADDOUPS
8 East Broadway, Suite 201
Salt Lake City, Utah 84111



Tab I

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT, STATE OF UTAH

IN AND FOR WEBER COUNTY, OGDEN DEPARTMENT

BLAKE WILLIAM WADDOUPS, and JAMES EDWARD SPARROW, JR., Plaintiffs, vs. THE AMALGAMATED SUGAR COMPANY, a Utah corporation, et al., Defendants.	**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT** JAN 19 1999 Civil No. 950900441 Judge Stanton M. Taylor

Pursuant to Rule 4-501(1)(b) of the Code of Judicial Administration, Plaintiffs present the following points and authorities in opposition to Defendant's Motion to Dismiss Plaintiffs' Amended Complaint.

INTRODUCTION

Defendant Amalgamated argues, in effect, that Idaho allows a business to violate its public policy so long as the business employs its workers under a union contract. This assertion is supposedly based on the fact that Idaho provides contract damages as the remedy

available under the cause of action for wrongful discharge in violation of public policy. In other words, Amalgamated asserts that persons who have private remedies are not entitled to public remedies. This mutual-exclusivity argument, however, is not supported by law or logical reasoning. It is supported only by non-decision of the Idaho supreme court which this Defendant attempts to elevate to the level of controlling precedent.

Defendant Amalgamated also argues that Plaintiffs' claims are preempted by federal law. Defendant argues that Plaintiffs' private rights under their collective bargaining agreement supplanted the state right of action provided for the purpose of protecting public rights. The United States Supreme Court has addressed this argument and soundly rejected it. That the federal preemption would be more lucrative for this Defendant (its real argument) is immaterial. Because the cause of action of wrongful discharge in violation of public policy and the acts, rules, and regulations of Congress can be easily reconciled, there is no preemption in this case.

STANDARD OF REVIEW

When ruling on a motion to dismiss, the Court "must construe the complaint in the light most favorable to the plaintiff[s] and indulge all reasonable inferences in [their] favor." Mounteer v. Utah Power & Light Co., 823 P.2d 1055, 1058 (Utah 1991). The Court may grant a motion to dismiss "only where it appears that the . . . plaintiffs would not be entitled to relief under the facts alleged or under any state of facts they could prove to support their claim." Robertson v. Gem Ins. Co., 828 P.2d 496, 499 (Utah App. 1992) (quoting Prows v. State, 822 P.2d 764, 766 (Utah 1991)).

ARGUMENT

I. THE AVAILABILITY OF ADMINISTRATIVE RIGHTS NEGOTIATED FOR AND INCLUDED IN THE CBA IS NOT RELEVANT TO THIS STATE-LAW ACTION.

Defendant Amalgamated argues that the provision of a wrongful discharge cause of action for at-will employees precludes the existence of a wrongful discharge cause of action for employees who have negotiated any type of restraint on an employer's discharge rights. Defendant cites no authority supporting its conclusion except those cases acknowledging the cause of action for at-will employees.

Although this Defendant consistently refuses to acknowledge the public policy behind the public policy exception, it is the public policy that is relevant — and not the discharge.

The discharge itself (and the "just cause" requirement under the CBA) only gives rise to private interests between the employee and the employer. The public policy exception requires a public aspect to the firing which makes the firing unlawful. See Peterson v. Browning, 832 P.2d 1280, 1282 (Utah 1992) (quoting Foley v. Interactive Data Corp., 47 Cal. 3d 654, 765 P.2d 373, 379, 254 Cal. Rptr. 211 (Cal. 1988)).

The fact of a discharge is only an element of the wrongful discharge cause of action, not the underpinning of the cause of action.[1] The public policy exception (through an award of damages pursuant to state law) regulates as effectively as forms of preventive relief. See San Diego Building Trades Council v. Garmon, 359 U.S. 236, 247 (1959). Thus, the courts have provided a wrongful discharge remedy to protect the public interests, whereas the unions created a just cause remedy to protect the private interests of union members.

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[1] "To make out a prima facie case of wrongful discharge, an employee must show: (i) that his employer terminated him; (ii) that a clear and substantial public policy existed; (iii) that the employee's conduct brought the policy into play; and (iv) that the discharge and the conduct bringing the policy into play are causally connected. *Cf. Heslop*, 839 P.2d at 837); *Wilmot v. Kaiser Alum. & Chem. Corp.*, 118 Wash. 2d 46, 821 P.2d 18, 28-29 (Wash. 1991); Henry H. Perritt, Jr., "The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?," 58 U. Cinn. L. Rev. 397, 398-99 (1989). As to subpart (iv), the employee initially need only show that the conduct bringing the public policy into play "was a cause of the firing." *See Wilmot*, 821 P.2d at 29. If the employee establishes a prima facie case, the employer must then articulate a legitimate reason for the discharge. *See id.* When faced with evidence of a legitimate reason for termination, the employee must prove that engaging in the protected conduct was a "substantial factor" in the employer's motivation to discharge the employee. *See id.* at 30." Ryan v. Dan's Food Stores, _____ P.2d _____; 350 Utah Adv. Rep. 3 (Utah 1998).

Defendant Amalgamated asserts that this Court should speculate that the Idaho supreme court would not provide a cause of action to union workers protected by a "just cause" termination standard. Defendant's memo. at p. 13. The Idaho supreme court, on the other hand, stated:

> In *Watson v. Idaho Falls Consol. Hosps., Inc.*, 111 Idaho 44, 720 P.2d 632 (1986), this Court upheld a jury instruction which instructed that a termination based on legal union activities would be contrary to public policy established by the Legislature.

Hummer v. Evans, 923 P.2d 981, 986 (Idaho 1996); see **also Rosencrans** v. Intermountain Soap Co., 605 P.2d 963 (Idaho 1980) (imposing a good faith requirement on discharge of an employee pursuant to a contract of a definite term); accord Metcalf v. Intermountain Gas Co., 778 P.2d 744 at n. 1 (Idaho 1989) (reversing summary judgment because a triable issue of fact existed with respect to the existence of a contract and approvingly allowing the breach of contract claim to be tried together with violation of public policy claim). Idaho has acknowledged and does acknowledge the right of union workers to maintain a cause of action based upon state law.

II. REPORTING AMALGAMATED'S CRIMINAL CONDUCT TO PUBLIC AUTHORITIES IS NOT NECESSARY TO STATE A CLAIM BECAUSE PLAINTIFFS DO NOT BASE THEIR CLAIMS ON THE PARTICULAR PUBLIC POLICY WHICH ADDRESSES THE ENFORCEMENT OF CRIMINAL STATUTES.

Plaintiffs do not allege that the enforcement of criminal statutes is the public policy upon which their claims rest. Furthermore, Plaintiffs do not allege that their conduct advanced this particular public policy. This is true despite Amalgamated's earnest desire to show that such an allegation, if made, would fail.

The public policy upon which Plaintiffs rely is the policy favoring untainted, unpoisoned, uncontaminated food.[2] Such a policy is furthered primarily through conscientious employees of food-producing corporations. Defendant's conclusion that the goal of clean food cannot be obtained without government involvement is a *non sequitur*, at best, "a nonsensical distinction," at worst.

> The employee who chooses to approach his employer should not be denied a remedy simply because a direct report to law enforcement agencies might effectuate the exposure of crime more quickly. This would be a nonsensical distinction.

Parr v. Triplett Corp., 727 F. Supp 1163, 1166-77 (N.D. Ill. 1989). The allegations regarding

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[2] "The purpose of [food safety statutes] is clearly the protection of the public health and safety. The accomplishment of that purpose is of prime importance and must ve vigorously championed. The high degree of danger and serious consequences latent in the distribution of food to the public require the imposition of the duty amounting to the creation of the strictest liability." Niemann v. Grand Central Market, Inc., 337 P.2d 424 (Utah 1959).

Amalgamated's violation of public policy interest "are not dependent on reporting them to an outside agency; they stand on their own." Verduzco v. General Dynamics, 742 F. Supp 559, 562 (S.D. Cal. 1990); accord Moyer v. Allen Freight Lines, Inc., 885 P.2d 391, 395 (Kan. App. 1994) ("[A]n employee may report a serious infraction of a rule, regulation, or law to either company management or law enforcement officials.").

Defendant Amalgamated argues that the recent Utah case of *Fox v. MCI* supports its conclusion. Defendant Amalgamated errs as Plaintiffs explained previously in opposition to this Defendant's motion for summary judgment.

Fox did not overrule previous Utah law *sub silentio*. See Carrier v. Pro-Tech Restoration, 909 P.2d 271, 276 (Utah App. 1995) (expressing unwillingness to read case to overrule another *sub silentio* because "the two situations are so different"). The Utah Supreme Court specifically stated in *Heslop*:

> We do not agree that plaintiff cannot meet a public policy requirement simply because he did not report the violation to the Attorney General or to the Commissioner. Plaintiff pursued all internal methods for resolving the problem; he need not have gone outside the Bank to try to correct the policy violation.

Heslop v. Bank of Utah, 839 P.2d 828, 838 (Utah 1992) (noting that the act considered served a substantial public policy because it protects the public as well as regulating financial institutions themselves). The analysis in *Fox* relied upon by this Defendant only addresses the public policy of criminal law enforcement — not the policy achieved by the law. By

their nature, criminal laws cannot be enforced unless reported. On the other hand, food can be kept clean and the public can be kept healthy without reports to public authorities. In this situation:

> [A] fundamental public interest is implicated whether or not the plaintiff reports any alleged wrongdoing to an outside agency, and whether or not a statute has been violated.

Verduzco, 742 F. Supp at 561; accord Moskal v. Fist Tennessee Bank, 815 S.W.2d 509 (Tenn. App. 1991) (acknowledging cause of action asserted by employee who refused to participate, continue to participate, or remain silent about illegal activities).

III. IDAHO'S VERSION OF THE PUBLIC POLICY EXCEPTION IS EXTREMELY BROAD.

Idaho has described the public policy exception and the duty of good faith and fair dealing as "principles under which freedom of contract of private dealing is restricted by law for the good of the community." Jackson v. Minidoka Irrigation Dist., 563 P.2d 54, 58 (Idaho 1977) (quoting Petermann v. International Brotherhood of Teamsters, 344 P.2d 25 (Cal. 1959) (quoting 72 C.J.S. Policy at p. 212)). Idaho's public policy[3] exception is based upon the constructive duties of good faith and fair dealing which "are implied obligations of every contract." Luzar v. Western Surety Co., 692 P.2d 337, 340 (Idaho 1984); see also Metcalf v. Intermountain Gas Co., 778 P.2d 744, 748 (Idaho 1989) (recognizing that Idaho joined "the minority view in this country. . . .").

The duty of good faith and fair dealing imposed on employment contracts is

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[3] The Idaho Legislature has expressed its public policy:

> Economic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people of this state. Involuntary unemployment is therefore a subject of national and state interest and concern which requires appropriate action to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment. . . .

Idaho Code Ann. § 72-1302.

extremely broad in Idaho. Idaho's supreme court stated:

> [W]e conclude that any action by either party which violates, nullifies or significantly impairs any benefit of the employment contract is a violation of the implied-in-law covenant of good faith and fair dealing which we adopt today.

Metcalf v. Intermountain Gas Co., 778 P.2d 744, 750 (Idaho 1989). A dissenting justice described this standard as "far too liberal and loose a standard." Id. Nevertheless, the foregoing is Idaho law.

In addition, the Idaho supreme court has explained that the breach of the duty of good faith is a violation "separate and apart from the a breach of contract per se and . . . damages may be recovered for the [violation] and for the contract breach." White v. Unigard Mut. Ins. Co., 730 P.2d 1014, 1017 (Idaho 1986) (discussing the tort of bad faith breach of an insurance contract) (quoting Anderson v. Continental Ins. Co., 271 N.W.2d 368, 374 (Wis. 1978)). In other words, Plaintiffs' claims are based on Amalgamated's breach of its duties which arose because of its contract with Plaintiffs, but the claims are not claims "on the contract." Id. at 1020. Plaintiffs' claims are separate and distinct arising under legal obligations imposed by state law.[4]

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[4] Another example of this type of cause of action arising because of a contract but not being a suit on the contract is the doctrine of *respondeat superior*. See also Interwest Construction v. Palmer, 923 P.2d 1350 (Utah 1996) (explaining that the duty to perform contractual duties in such a manner as to not injure persons or property arises from law, not contract); see also Restatement (Second) of Torts §324A (1965).

Under Idaho law, public policy is implicated by any firing "motivated by bad faith **or** malice **or** based on retaliation [because such conduct] is not the best interest of the economic system or the public good." Jackson v. Minidoka Irrigation Dist., 563 P.2d 54, 58 (Idaho 1977) see also Burdick v. American Express Co., 677 F.Supp 228 (S.D. N.Y. 1988) (noting that a distinction between "preventive" and "retaliatory" dismissals would serve no useful purpose). The *sine qua non* of Plaintiffs' claims against Amalgamated is Amalgamated's misconduct with respect to clean food and Plaintiffs' staunch opposition thereto. Amended Complaint at ¶¶ 19-30; 32-34; 40-44. Plaintiffs' claims do not depend upon any contractual term negotiated for and included in the CBA.

Amalgamated fired Plaintiffs on pretextual bases because Messrs. Waddoups and Sparrow refused to shut up and be "team players" with respect to the Adulterated Sugar. It is this opposition to Amalgamated's misconduct which furthered the public policy of clean, unadulterated food and which gives rise to Plaintiffs' claims. It is Amalgamated's evil motive (a prototypical question of fact) in firing Plaintiffs for their advancement and defense of public policy that is the basis of Plaintiffs' claims. The motivation for Plaintiffs' firings was to hide Amalgamated's public policy malfeasance (as opposed to contractual nonfeasance); therefore, Plaintiffs clearly and unequivocally state a claim:

> [A]n employee may claim damages for wrongful discharge when the **motivation for the firing contravenes public policy**.

Jackson, 563 P.2d at 57. Despite Amalgamated's desperate efforts to mischaracterize their claims,[5] Plaintiffs clearly allege that they complained about contaminated sugar and opposed Amalgamated's cover-up. As a direct result of their complaints, Mr. Waddoups was suspended for three days and summarily fired on his next work day. See, e.g., Boyle v. Vista Eyewear, Inc., 700 S.W.2d 859 (Mo. App. 1985) (holding that allegation of employer's violation of FDA standards was basis of public policy exception where fired employee warned and threatened employer, continued to attempt to comply with FDA regulations and eventually reported her employer to the FDA. "[A]ny one of those allegations would state a cause of action." Id. at 877); Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385 (Conn. 1980) (holding that employee had a cause of action for wrongful discharge in violation of public policy where he urged his employer to comply with state FDCA); Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984) (holding that an employee who was discharged where complaints concerned his employer's sale and delivery of adulterated milk stated a claim under California law). Mr. Sparrow was harassed for cooperating with and supporting Mr. Waddoups and was fired only days before Mr. Waddoups's suspension. See, e.g., Reich v. Cambridgeport Air Systems, Inc., 26 F.3d 1187 (1st Cir. 1994) (addressing questions of fact raised by joint actors in employee-housecleaning meant "to impress on

[5] When ruling on a motion to dismiss, the Court "must construe the complaint in the light most favorable to the plaintiff[s] and indulge all reasonable inferences in [their] favor." Mounteer v. Utah Power & Light Co., 823 P.2d 1055, 1058 (Utah 1991).

employees not to be palsy with bad actors.").

IV. FEDERAL LAW DOES NOT PREEMPT IDAHO'S CAUSE OF ACTION FOR WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY BECAUSE THE COURT WILL NOT BE REQUIRED TO INTERPRET THE CBA.

Defendant Amalgamated concludes, and asks this Court to infer, that Section 301 preempts Plaintiffs' causes of action because Idaho bases the cause of action of wrongful discharge in violation of public policy on the parties' duties of good faith and fair dealing inherent in the employment contract.[6] However, "pre-emption cannot be inferred." Wisconsin Public Intervenor v. Mortier, 115 L. Ed. 2d 532, 111 S. Ct. 2476, 2486 (1991). Moreover, the United States Supreme Court has concluded that:

> [E]ven if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is "independent"of the agreement for § 301 pre-emption purposes.

Retherford v. AT & T Communications, 844 P.2d 949, 955 (Utah 1992) (quoting Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 409-10 (1988). Under the circumstances of this case, there is no section 301 preemption.

In *Allis-Chalmers Corp. v. Lueck*, the United States Supreme Court held that "when

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[6] Defendant asserts that the basis of the Idaho cause of action on the duty of good faith and fair dealing is extremely significant. The Idaho supreme court, on the other hand, refer to such criticism as "hairsplitting" having no merit. Metcalf, 778 P.2d at 752.

resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract," the claim is preempted by § 301. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 220 (1985) (holding that § 301 preempted a state law tort action for bad-faith delay in making disability-benefit payments due under a collective bargaining agreement).

The *Allis-Chalmers* Court drew the following distinction between Plaintiffs' claims and claims arising out of agreements negotiated by the parties to a collective bargaining agreement:

> Section 301 on its face says nothing about the substance of what private parties may agree to in a labor contract. Nor is there any suggestion that Congress, in adopting § 301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation. **Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored. Clearly, § 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law.** In extending the pre-emptive effect of § 301 beyond suits for breach of contract, **it would be inconsistent with congressional intent under that section to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.**
>
> * * *

> Therefore, state-law rights and obligations that do not exist independently of private agreements, and that as a result can be waived or altered by agreement of private parties, are pre-empted by those agreements. **Our analysis must focus, then, on whether** the Wisconsin tort action for **breach of the duty of good faith as applied here confers nonnegotiable state-law rights on** employers or **employees independent of any right established by contract**, or, instead, whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract.

Id. at 211-13 (footnotes and citation omitted) (emphasis added).

In other words, in lieu of its breathless argument, Defendant Amalgamated merely needed to demonstrate that the right to conduct its business in a manner otherwise proscribed by Idaho law was negotiated and made part of the Amalgamated collective bargaining agreement. Plaintiffs cannot locate such a clause in the CBA.

Such a clause cannot be negotiated. The Utah Court of Appeals has explained that the duty of good faith and fair dealing is non-negotiable:

> "While it is true that courts impose an obligation of good faith in every aspect of the contractual relationship . . . the obligation of good faith is 'constructive' rather than 'implied'" because the obligation is imposed by law and **cannot be disclaimed**.

PDQ Lube Ctr., Inc. v. Huber, 949 P.2d 792 (Utah App. 1997) (quoting Olympus Hills Shopping Ctr., Ltd. v. Smith's Food & Drug Ctrs., Inc., 889 P.2d 445, 450 n.4 (Utah App. 1994) (quoting 3A Arthur L. Corbin, Corbin on Contracts § 654A(B) (2d ed. 1993) (emphasis added))); see also Beck v. Farmers Ins. Exch., 701 P.2d 795, 801 at n. 4 (Utah

1985) (in first-party contract, the "duty to perform the contract in good faith **cannot, by definition, be waived by either party to the agreement**."). Because the duty of good faith and fair dealing is non-negotiable, Plaintiffs' causes of action are not preempted under *Allis-Chalmers* because this Court can determine whether the defendants have engaged in conduct prohibited by Idaho law without referring to or interpreting the collective bargaining agreement.

Defendant Amalgamated might be trying to assert — as an affirmative defense which cannot form the basis of a motion to dismiss[7] — that through the CBA and the adoption of the grievance procedures, Plaintiffs consented to its state-law violations or waived their state-law rights.[8] Again, however, the United States Supreme Court has considered and rejected such a conclusion. The Court set forth a point of law that this Defendant is in dire need of learning — that Plaintiffs are masters of their complaint and this Defendant's shadowboxing[9] with out-of-context terms cannot change this fact:

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[7] "As with any affirmative defense, [Amalgamated has] the burden of proving every element necessary to establish that [its argument] bars" Plaintiffs' claims. Seale v. Gowans, 923 P.2d 1361, 1363 (Utah 1996).

[8] Because, under any other theory, its references to grievance procedures would have no merit with respect to the state-law causes of action.

[9] See, e.g., Defendant's Memo. at n. 3.

> It is true that when a defense to a state claim is based on the terms of a collective-bargaining agreement, the state court will have to interpret that agreement to decide whether the state claim survives. But the presence of a federal question, even a § 301 question, in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule -- **that the plaintiff is the master of the complaint**, that a federal question must appear on the face of the complaint, and that the **plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court**. When a plaintiff invokes a right created by a collective-bargaining agreement, the plaintiff has chosen to plead what we have held must be regarded as a federal claim, and removal is at the defendant's option. But a **defendant cannot**, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated. If a defendant could do so, the plaintiff would be master of nothing.

Caterpillar Inc. v. Williams, 482 U.S. 386, 395 (1987).

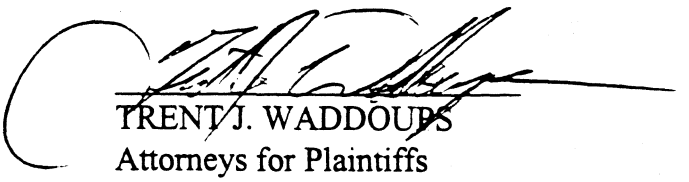
In sum, Plaintiffs' claims are based upon state law. The Court will not need to refer to the collective bargaining agreement in order to rule that firing employees who attempt to remedy Amalgamated's poisoning of the food supply is conduct that Idaho does not condone.

CONCLUSION

Based upon the foregoing, Defendant's Motion for Summary Judgment must be denied in its entirety.

RESPECTFULLY SUBMITTED this 12 day of January, 1999.

CARR & WADDOUPS



TRENT J. WADDOUPS
Attorneys for Plaintiffs

MAILING CERTIFICATE

I HEREBY CERTIFY that I caused a true and correct copy of PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT to be mailed, postage prepaid, this 15 day of January, 1999 to:

Mr. W. Mark Gavre
PARSONS, BEHLE & LATIMER
P.O. Box 45898
Salt Lake City, UT 84145-0898

TRENT J. WADDOUPS

Tab J

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Salt Lake City, Utah 84145-0898
Telephone: (801) 532-1234

IN THE SECOND JUDICIAL DISTRICT COURT

IN AND FOR WEBER COUNTY, STATE OF UTAH

* * * * * * *

BLAKE WILLIAM WADDOUPS and JAMES EDWARD SPARROW, JR.,	)	Case No. 950900441
Plaintiffs,	)	Judge Stanton M. Taylor
vs.	)	
THE AMALGAMATED SUGAR COMPANY, a Utah corporation, et al.,	)	**REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT**
Defendant.	)	

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I. INTRODUCTION

In its opening memorandum, Amalgamated Sugar explained that plaintiffs' public policy wrongful discharge claim should be dismissed because it fails to state a claim under Idaho law and because it is preempted by federal law. Under Idaho law, plaintiffs' claim fails for two reasons. First, the claim is based on an implied contractual obligation not to terminate an employee's employment in violation of public policy. Idaho courts have not found such an implied contractual obligation where, as here, plaintiffs already had a collective bargaining agreement that protected them from discharge without "just cause." Second, assuming arguendo that plaintiffs can assert the claim, the claim nonetheless fails because plaintiffs did not engage in public conduct which is required to state a public policy claim under Idaho law. In particular, while plaintiffs argue that they were potential "whistleblowers," they never "blew the whistle" on the Company.

Plaintiffs' claim is preempted by federal labor law because the claim is an implied contract claim and plaintiffs' employment contract was a collective bargaining agreement governed by federal labor law. Accordingly, the claim can only be asserted as a breach of the collective bargaining agreement claim under federal law. Plaintiffs do not assert such a claim. Instead, plaintiffs posture their claim as a separate state-law contract claim in an effort to avoid the preemptive effect of federal labor law. Plaintiffs' effort is unavailing because their claim is necessarily dependent on their collective bargaining agreement (and hence governed by federal

law) and because even as a purported state-law contract claim, the claim is preempted by federal labor law.

Plaintiffs' opposition memorandum makes a variety of arguments, but does not present either law or facts sufficient to alter the conclusion that plaintiffs fail to state a claim under Idaho law and that their purported claim is barred by federal law.[1]

ARGUMENT

II. PLAINTIFFS FAIL TO STATE A CLAIM UNDER IDAHO LAW

A. IDAHO LAW DOES NOT RECOGNIZE PLAINTIFFS' CLAIM BECAUSE PLAINTIFFS' EMPLOYMENT WAS GOVERNED BY A COLLECTIVE BARGAINING AGREEMENT.

Idaho law recognizes a cause of action for public policy wrongful discharge where an at-will employee is discharged in violation of Idaho public policy. Additionally, a public policy wrongful discharge claim, like a claim for breach of the implied covenant of good faith and fair dealing, is a contract claim, not a tort claim. Both claims rest on an implied contractual obligation that is read into the underlying contract between the employee and the employer.

> [T]his Court [declares its] intent to classify a cause of action for wrongful termination in violation of public policy as a breach of contract rather than a tort. All employment contracts terminable at will are subject to the covenant of good faith and fair dealing. A breach of the covenant is a breach of the employment contract, and is not a tort. The potential recovery results in contract damages,

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[1] Amalgamated Sugar's Motion is a summary judgment motion because it goes beyond the pleadings and relies on plaintiffs' depositions for certain basic facts. Plaintiffs cannot avoid summary judgment by relying on mere allegations, nor can they dispute their own testimony.

> not tort damages. Similarly, a cause of action for wrongful termination of a contract of employment at will based on a violation of public policy is a contract cause of action which results in contract damages.

Hummer v. Evans, 923 P.2d 981, 987 (Idaho 1996) (citations and internal quotations marks omitted; emphasis added).

Idaho courts have not recognized an implied contractual obligation not to discharge in violation of public policy where the employee is already protected by a just cause provision in a collective bargaining agreement.[2] See cases cited in Def. Opening Memo. at 12. Plaintiffs assert that "Idaho acknowledged and does acknowledge the right of union workers to maintain a cause of action based upon state law." Pl. Opposition Memo. at 5. Plaintiffs are incorrect, at least with respect to the claim they assert. The one case cited by plaintiffs in support of their position actually undermines it. Id. In Watson v. Idaho Falls Consolidated Hospitals, Inc., the plaintiff "attempt[ed] to unionize the hospital," but was unsuccessful when "a majority of the employees rejected the attempt to unionize the hospital." 720 P.2d 632, 633 (Idaho 1986). Subsequently, the plaintiff was allegedly discharged in "retaliation for [her] pro-union activities." Id. at 636. On these facts, the plaintiff asserted that her discharge violated public policy. The plaintiff's employment was never governed by a collective bargaining agreement, nor was the plaintiff

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[2] The one court to have addressed such a claim, rejected it: While at-will employees are protected from terminations that violate public policy, "[t]hat protection however is not provided to employees whose discharge is contractually protected by a just cause provision of a collective bargaining agreement." Laramee v. French & Bean Co., 830 F. Supp. 803, 806 (D. Vt. 1993).

protected by a "just cause" standard for discharge. In allowing the plaintiff to assert her public policy claim, the Idaho Supreme Court made clear that it was recognizing the claim in the context of at-will employment: "An employee at will may not . . . be discharged for a reason contravening public policy." Id. at 634 (emphasis added).

In sum, there is no support in Idaho law for the notion that an implied contractual obligation not to discharge in violation of public policy should be read into plaintiffs' collective bargaining agreement which already protected plaintiffs' employment by permitting discharge only where there was "just cause." Given that no Idaho case supports plaintiffs' argument, that plaintiffs were already protected from wrongful discharge by their collective bargaining agreement and that plaintiffs' employment contract was governed by federal law, there is no reason for this Court to expand Idaho law in the novel manner urged by plaintiffs.

B. PLAINTIFFS FAIL TO STATE A "WHISTLEBLOWER" PUBLIC POLICY CLAIM UNDER IDAHO LAW.

Under Idaho law, a public policy wrongful discharge claim may be stated where an employee engages in certain protected conduct of a public nature and is discharged because of that conduct. There are three situations in which employees' conduct may be entitled to public policy protection:

1. Where employees "refuse to commit unlawful acts";
2. Where employees "perform an important public obligation"; and
3. Where employees "exercise certain legal rights or privileges."

Sorensen v. Comm Tek, Inc., 799 P.2d 70, 74 (Idaho 1990); see also Anderson v. Farm Bureau Mutual Ins. Co. of Idaho, 732 P.2d 699, 707 (Idaho App. 1987) (same). In light of the above three criteria, a claim for public policy wrongful discharge may be stated where an employee is discharged for refusing to commit perjury, for filing a worker's compensation claim, for serving on a jury, or for complying with a court-issued subpoena. Id.; Hummer v. Evans, 923 P.2d 981, 986-87 (Idaho 1996).

A "whistleblower" public policy wrongful discharge claim may be stated where an employee reports a significant statutory or regulatory violation to the appropriate public authority. In Ray v. Nampa School District No. 131, a maintenance electrician reported "several electrical and building code violations to the state inspector." 814 P.2d 17, 21 (Idaho 1991). The employee was allegedly discharged for reporting these safety violations to the public official. Id. Given the plaintiff's position and the public official to whom he reported the violations, the Idaho Supreme Court ruled that the employee could state a public policy claim as a whistleblower. Id.

In the instant case, plaintiffs allege that Amalgamated Sugar committed a federal crime by shipping contaminated sugar for human consumption in interstate commerce in violation of the Food, Drug & Cosmetics Act. Amended Complaint ¶ 44; Sparrow Depo. at 46-7. While the Amended Complaint alleges that plaintiffs were potential whistleblowers in that they supposedly "threaten[ed] to expose the [Company's] illegal activity," neither plaintiff contacted the FDA or any other public authority. Sparrow Depo. at 173-74; Waddoups Depo. at 65; Amended

Complaint ¶¶ 23-44. In his deposition Sparrow testified that he did not raise the issue of contaminated sugar with anyone at any time. Waddoups in his deposition testified that he "never" said to the Company that he was thinking of going public with any concern about contaminated sugar. See Def. Opening Memo. at 10-11 (quoting plaintiffs' deposition testimony).

Given that plaintiffs did not report their supposed concern about contaminated sugar to any public authority, they cannot state a whistleblower public policy claim under Idaho law. Plaintiffs cannot satisfy any of the three criteria for protected public conduct. Plaintiffs did not refuse to commit an unlawful act (such as perjury) and did not exercise any public right or privilege (such as serving on the jury). The third criteria — "perform[ing] an important public obligation" — is likewise not satisfied because plaintiffs do not even allege they did anything public. Where, as here, an employee accuses company management of criminal conduct, the employee can hardly claim to "perform an important public obligation" by talking to the criminal about its own crime. Neither the public nor any regulatory or law enforcement authority would be alerted to any matter of public concern by such conduct. In any case, there is no evidence of any such communication in the instant case. Finally, plaintiffs do not cite any Idaho case law in support of the notion that they may be public policy whistleblowers without "blowing the

whistle" or taking any public action.[3] Pl. Opposition Memo. at 6-7. Plaintiffs' claim is simply groundless.

Amalgamated Sugar pointed out that generally states, including Utah, require whistleblowing to be public, i.e., the employee must report the employer's improper conduct to the public authorities. This is especially true where, as here, the employer is accused of criminal conduct. See Def. Opening Memo. at 15-16. In response, plaintiffs attempt to recharacterize their claim and misstate Utah law on point. Pl. Opposition Memo. at 6-7.

In their Amended Complaint, plaintiffs accuse Amalgamated Sugar of violating the criminal section of the federal Food, Drug and Cosmetic Act, and claim that they were discharged for threatening to expose that "illegal activity." Amended Complaint ¶¶ 40, 44. Now plaintiffs argue that their public policy claim does not rest on "the enforcement of criminal statutes," and admit that "their conduct [did not] advance[] this particular public policy." Pl. Opposition Memo. at 6. Not only is this new position inconsistent with plaintiffs' Amended Complaint, it also deprives their claim of any public policy foundation. Having given up the Food, Drug and Cosmetics Act and having failed to invoke any Idaho statute or court decision, plaintiffs have no basis for their purported public policy. They merely assert a free floating,

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[3] Plaintiffs argue that "Idaho's version of the public policy exception is extremely broad." Pl. Opposition Memo. at 9. In support of this assertion, plaintiffs cite to Idaho Code § 72-1302 (preface to unemployment benefits statute). Id. at 9n.3. This statutory provision does not support plaintiffs' position because the Idaho Supreme Court has ruled that a public policy wrongful discharge claim based on § 72-1302 is "without merit." Section 72-1302 "does not rise to the level of a statement of public policy which would prevent an employer from discharging an employee at will." Ray v. Nampa School Dist., 814 P.2d at 22.

nonspecific policy favoring "uncontaminated food." Plaintiffs provide no foundation for this supposed public policy, and make no effort to show that Idaho recognizes it as a basis for a private right of action. Pl. Opposition Memo. at 6. In short, in trying to escape the consequences of their failure to report to any public authority the criminal conduct they allege, plaintiffs make clear the groundlessness of their public policy claim.

With respect to Utah law, plaintiffs argue that a whistleblower need not report criminal conduct to the public authorities. Pl. Opposition Memo. at 7. Plaintiffs rely on the out-of-date Heslop v. Bank of Utah case for their argument. Id. In the subsequent Fox v. MCI Communications decision, the Utah Supreme Court ruled that "if an employee reports a criminal violation to an employer, rather than to public authorities, and is fired for making such reports, that does not, in our view, contravene a clear and substantial public policy." 931 P.2d 857, 861 (Utah 1997). More recently, the Utah Supreme Court reiterated that in order to state a whistleblower claim, an employee alleging criminal conduct must report the conduct to the public authorities. Ryan v. Dan's Food Stores, 350 Utah Adv. Rep. 3, 8 (1998) ("reporting to a public authority criminal activity of the employer . . . . brings into play a clear and substantial public policy"). The Utah Supreme Court also clarified its earlier decision by pointing out that in Heslop both state and federal authorities were informed of the employer's illegal activities, the plaintiff met with the Utah Attorney General's office as part of its investigation of employer, and the plaintiff's internal reporting took place in this context. Id. at 10 n. 7.

Utah law clearly requires a whistleblower, alleging criminal misconduct by his employer, to report the illegal activity to the public authorities in order to state a claim. While plaintiffs' claim is not based on Utah law, there is no reason to think that Idaho law would be any different in light of its requirement that a whistleblower "perform an important public obligation" in order to state a claim. Given that plaintiffs did not report the alleged illegal activity to any public authority and did not even tell the Company they were thinking of doing so, there is simply no basis for plaintiffs' public policy wrongful discharge claim.

III. PLAINTIFFS' CLAIM IS PREEMPTED BY FEDERAL LABOR LAW

A. FEDERAL LAW GOVERNING COLLECTIVE BARGAINING AGREEMENTS.

Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, exclusively governs claims for breach of collective bargaining agreements and also claims relating to collective bargaining agreements. The United States Supreme Court has explained:

> [This] Court has made clear that § 301 is a potent source of federal labor law, for though state courts have concurrent jurisdiction over controversies involving collective bargaining agreements,... state courts must apply federal law in deciding those claims, and indeed any state-law cause of action for violation of collective bargaining agreements is entirely displaced by federal law under § 301. State law is thus "preempted" by § 301 in that only the federal law fashioned by the courts under § 301 governs the interpretation and application of collective bargaining agreements.

Steelworkers v. Rawson, 495 U.S. 362, 368 (1990) (citations omitted).

While an individual may sue in state court on a claim relating to a collective bargaining agreement, he must do so in compliance with the requirements of § 301. Where, as here, there is

a grievance and arbitration provision in the collective bargaining agreement. a § 301 claim may be asserted in court only where the plaintiff exhausted or attempted to exhaust the grievance and arbitration procedure, the plaintiff pleads and proves that his union breached its duty of fair representation to him, and the claim is brought within the six month statute of limitations period. See Def. Opening Memo. at 16-18 (summarizing federal labor law); Del Costello v. International Brotherhood of Teamsters, 462 U.S. 151, 172 (1983) (6-month statute of limitations).

B. PLAINTIFFS' CLAIM CAN ONLY BE A § 301 CLAIM.

As explained above, plaintiffs' claim is an implied contract claim under Idaho law. See p.3 above. The duty not to discharge an employee in violation of public policy is an implied contractual obligation read into the underlying contract between the parties. As with the implied covenant of good faith and fair dealing, a public policy claim is a claim for "breach of the employment contract." Hummer v. Evans, 923 P.2d at 987. Because plaintiffs' employment contract was a collective bargaining agreement, the implied contractual obligation at issue here is read into the collective bargaining agreement. Therefore, plaintiffs' claim is a claim for breach of the collective bargaining agreement and is governed by § 301.

Plaintiffs clearly had opportunities to seek a remedy and to assert a proper claim under § 301. Plaintiffs could have filed grievances under the collective bargaining agreement which would have favored them in many ways. The grievance process is efficient and would not have cost plaintiffs anything. Plaintiffs would have been represented by their own union, and the Company would have had the burden of persuasion on the issue of "just cause" for plaintiffs'

discharge. The grievance process culminates in binding arbitration, and plaintiffs could have been reinstated with back pay if they prevailed. If the outcome of arbitration were unfavorable to plaintiffs, they still could have sought a remedy in court under § 301. Plaintiffs, however, did none of the above. They ignored their contractual remedies under the collective bargaining agreement and failed to assert a proper claim under § 301.

Plaintiffs appear to misunderstand how § 301 governs claims relating to collective bargaining agreements. Plaintiffs declare that Amalgamated Sugar must argue (or must be arguing) that plaintiffs relinquished all their state-law rights in the collective bargaining process in order for their current claim to be governed by § 301. Plaintiffs insist that they did not negotiate away their state-law rights, and therefore their current claim is unaffected by § 301. Pl. Opposition Memo. at 15, 16. Plaintiffs are mistaken both about the law and the Company's position.

Under § 301, an implied contract claim relating to collective bargaining agreement is cognizable as a contract claim under § 301. Since collective bargaining agreements are not confined to the four corners of labor agreement documents, implied contractual rights are routinely asserted before labor arbitrators and in court under § 301. See Def. Opening Memo. at 20 n.3. Under the collective bargaining agreement in the instant case, plaintiffs' claim could clearly have been asserted in the grievance and arbitration process and subsequently in court under § 301. For example, in 1998 a union employee, who was discharged by Amalgamated Sugar, filed a grievance which was taken to arbitration. The employee claimed that she was

discharged in retaliation for planning to file a sex discrimination charge under state law. The arbitrator ruled on the merits of the employee's retaliation claim. Although the arbitrator found no retaliation on the facts of the case, he ordered Amalgamated Sugar to reinstate the employee because of certain due process deficiencies in the Company's discipline of the employee. Amalgamated Sugar Co. (Humphreys 1998) at 5, 15-18, 30-31, enclosed herewith.

In sum, plaintiffs' implied contract claim is cognizable, and only cognizable, under § 301.[4] Plaintiffs could have pursued their claim through the grievance and arbitration process and in court under § 301. They chose not to do so.

C. PLAINTIFFS' CLAIM, AS A STATE-LAW CLAIM, IS PREEMPTED BY § 301.

Plaintiffs appear to recognize that their claim, as a state-law claim, is preempted by § 301. They therefore attempt to recharacterize their claim so as to escape federal labor law preemption. Plaintiffs argue alternatively that their claim is a non-contract claim or is a contract claim wholly unrelated to the collective bargaining agreement. Neither argument has any merit.

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[4] Plaintiffs argue that because the implied covenant of good faith and fair dealing is read into a contract by operation of law, it gives rise to an independent right that may not be "disclaimed" or "waived." Pl. Opposition Memo. at 15-16. On this basis plaintiffs apparently conclude that their claim is immune from the operation of § 301. Id. Plaintiffs' argument misses the point. An implied contractual obligation is part of the underlying contract. If there is a breach of the implied contractual obligation, a remedy may be sought as with any other breach of the contract. Such a remedy, however, must be pursued in conformity with the terms of the contract and the governing law. Amalgamated Sugar is not arguing that plaintiffs gave up or waived their rights to seek a remedy for the implied contractual breach they allege, but only that they must pursue the remedy properly under § 301 which governs their claim. The Ninth Circuit has made clear that an implied covenant claim is cognizable only as a claim based on the collective bargaining agreement under federal law, and if such a claim is pursued under state law, it is preempted by § 301. Rissetto v. Plumbers & Steamfitters Local 343, 94 F.3d 597, 599 (9th Cir. 1996) ("claim for breach of

(footnote continued on next page)

First, plaintiffs argue that their claim, while admittedly based on their collective bargaining agreement with the Company, is nonetheless not a contract claim:

> Plaintiffs' claims are based on Amalgamated's breach of its duties which arose because of its contract with Plaintiffs, but the claims are not claims "on the contract."

Pl. Opposition Memo. at 10. Any duties of Amalgamated Sugar arising out of its contract with plaintiffs are clearly contract duties. They cannot be anything else. It is nonsensical for plaintiffs to argue that a claim based upon contractual duties is not a contract claim.

Second, plaintiffs argue that their implied contract claim is "separate and independent" from the collective bargaining agreement. This argument is without foundation either in logic or in case law. Given that the Idaho Supreme Court has ruled that a public policy wrongful discharge claim, like an implied covenant claim, is a claim for "breach of the employment contract," plaintiffs' argument is without merit. Not surprisingly, plaintiffs do not cite a single case holding that an implied contract claim of any kind is independent and separate from the underlying contract. The Ninth Circuit (which provides the controlling federal labor law applicable to Idaho) has ruled that state-law implied contract and implied covenant claims are preempted by § 301 because the implied contractual obligations are part of the collective bargaining agreement. See, e.g., Rissetto v. Plumbers & Steamfitters Local 343, 94 F.3d 597,

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(footnote continued from previous page)

covenant of good faith and fair dealing is also clearly preempted because such covenant is an implied term of [the plaintiff's] CBA").

599 (9th Cir. 1996) ("claim for breach of covenant of good faith and fair dealing is . . . preempted because such covenant is an implied term of [the plaintiff's] CBA").[5]

Even as a purported "separate" contract claim, plaintiffs' claim is still preempted by § 301. There are two grounds for the preemption of any such "separate" contract claim. First, the claim concerns the employment of individuals covered by a collective bargaining agreement that already contains a termination provision. Any resolution of the state-law claim would involve construing the collective bargaining agreement, if only to comply with its procedural requirements. See, e.g., Chmiel v. Beverly Wilshire Hotel Co., 873 F.2d 1283, 1286 (9th Cir. 1989) (when independent contract claim "concerns a job position governed by the [CBA], it is completely preempted by Section 301"); Olguin v. Inspiration Consolidated Copper Co., 740 F.2d 1468, 1474 (9th Cir. 1984) ("any independent agreement of employment could be

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[5] Plaintiff's cite the U.S. Supreme Court's Allis-Chalmers decision for the proposition that claims based upon independent, nonnegotiable state-law rights are not preempted by § 301. Pl. Opposition Memo. at 14-15. Plaintiffs misunderstand Allis-Chalmers, which has no application to plaintiffs' claim. Allis-Chalmers concerned a state-law tort claim, not a contract claim, and in that context the Supreme Court inquired whether the state tort action conferred a "nonnegotiable state-law right" that was "independent of any right established by contract." Clearly, an implied contract obligation, even one imposed by operation of law, is not "independent of" but an integral part of the contract, and therefore clearly within the scope of Section 301. In any case, in Allis-Chalmers the Supreme Court found the tort action in question, bad-faith denial of disability benefits, preempted under § 301. See Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 212-13, 220 (1985).

effective only as part of the collective bargaining agreement" and is therefore preempted by § 301).

Second, plaintiffs' claim is inconsistent with their collective bargaining agreement and is preempted by § 301 on that additional ground. Plaintiffs' claim would not require them to use or exhaust the grievance and arbitration procedure and would not require them to assert a claim in court within the limitation period applicable to their collective bargaining agreement. Because of such inconsistencies, permitting plaintiffs' claim would frustrate and undermine the federal system of labor relations and collective bargaining. Accordingly, the claim is preempted under § 301. Laramee, 830 F.Supp. at 807 (public policy wrongful discharge claim preempted by § 301: "An employee who sidesteps the grievance machinery provided in the [labor] contract will have his independent suit against the employer . . . dismissed"); see also Def. Opening Memo. at 21-22 (citing and quoting cases).

IV. CONCLUSION

For the foregoing reasons and the reasons stated in Amalgamated Sugar's opening memorandum, plaintiffs' public policy wrongful discharge claim under Idaho law should be dismissed with prejudice. Accordingly, plaintiffs' Amended Complaint should also be dismissed with prejudice.

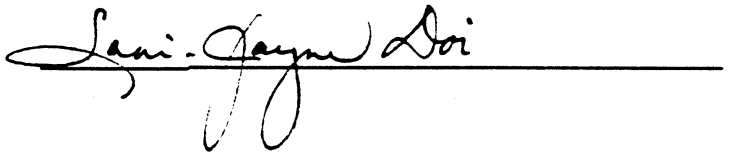
DATED this 5th day of March, 1999.

W. MARK GAVRE
MARGARET NIVER MCGANN
PARSONS BEHLE & LATIMER
Attorneys for The Amalgamated Sugar Company

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of March, 1999, I caused to be hand-delivered a true and correct copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT**, to:

Trent J. Waddoups
CARR & WADDOUPS
8 East Broadway, Suite 201
Salt Lake City, Utah 84111



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DATE: March 19, 1999

FROM: W. Mark Gavre, Esq.

TO:

CLERK OF THE COURT
SECOND DISTRICT COURT
2525 Grant Avenue
Ogden, Utah 84401

RE: DOCUMENTS TO BE FILED

ENCLOSURES:

- Reply Memorandum in Support of Defendant's Motion to Dismiss Plaintiffs' Amended Complaint
- Return, self-addressed stamped envelope

INSTRUCTIONS: Please file the Reply Memorandum and return the date/time-stamped copy in the enclosed envelope. Thank you very much for your assistance.

CLIENT NO.: Waddoups/Sparrow v. Amalgamated (00190.001)
By: WMG/Lani

Tab K

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IN THE SECOND JUDICIAL DISTRICT COURT

IN AND FOR WEBER COUNTY, STATE OF UTAH

* * * * * * * *

BLAKE WILLIAM WADDOUPS and JAMES EDWARD SPARROW, JR.,	)	Case No. 950900441
Plaintiffs,	)	Judge Stanton M. Taylor
vs.	)	**ORDER DISMISSING PLAINTIFFS' AMENDED COMPLAINT**
THE AMALGAMATED SUGAR COMPANY, a Utah corporation, et al.,	)	
Defendant.	)	

* * * * * * * *

This matter came on for hearing before the Court on Monday, March 29, 1999. Defendant The Amalgamated Sugar Company was represented by W. Mark Gavre of Parsons Behle & Latimer. Plaintiffs Blake William Waddoups and James Edward Sparrow, Jr. were represented by Trent J. Waddoups of Carr & Waddoups. In a telephone conference call with counsel for plaintiffs and defendant on Thursday, April 8, 1999, the Court orally issued its decision in this case.

On April 7, 1998, the Court granted defendant's Motion for Summary Judgment, dismissing all of plaintiffs' claims, but granting leave to plaintiffs to file an amended complaint stating a claim under Idaho law for wrongful discharge in violation of public policy. On December 2, 1998, plaintiffs filed an Amended Complaint asserting a claim for wrongful discharge in violation of Idaho public policy. Plaintiffs allege that defendant illegally shipped contaminated sugar, and that they were wrongfully discharged for objecting to or threatening to "blow the whistle" on defendant's alleged conduct. On January 6, 1999 defendant filed its Motion to Dismiss Plaintiffs' Amended Complaint, which motion has been fully briefed and argued.

Having considered the memoranda and arguments of counsel, the Court makes the following decision. Plaintiffs' claim for public policy wrongful discharge under Idaho law is dismissed with prejudice. There are three grounds for this dismissal: (a) Idaho law has recognized the cause of action for public policy wrongful discharge only in the context of at-will employment, and plaintiffs were employed under a collective bargaining agreement and were not at-will employees; (b) plaintiffs did not report the alleged wrongdoing by defendant to any public authority and therefore fail to state a whistleblower public policy wrongful discharge claim under Idaho law; and (c) plaintiffs' claim is preempted by federal labor law, specifically the Labor Relations Management Act, 29 U.S.C. § 185.

Based upon the foregoing and good cause appearing therefore, IT IS HEREBY ORDERED that defendant's Motion to Dismiss Plaintiffs' Amended Complaint is granted, and plaintiffs' Amended Complaint, and all claims and causes of action therein, is dismissed with

prejudice.

DATED this 15 day of ~~April, 1999~~ May 2000.

BY THE COURT:

STANTON M. TAYLOR
Second District Court Judge

APPROVED AS TO FORM:

Trent J. Waddoups
Attorney for Plaintiffs